81-1839

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the use tax imposed by Minn. Stat. §297A.14 on paper and ink consumed in publishing newspapers a "tax on knowledge" prohibited by the First Amendment?

2. By exempting from taxation the first $100,000 of paper and ink consumed annually by each publication, with the result that 97 percent of Minnesota's publishers pay no use tax while appellant alone pays two-thirds of the use taxes collected, does Minn. Stat. §297A.14 violate the First Amendment by discriminatorily restricting the speech of large publishers and enhancing the relative voice of small publishers?

3. By exempting from taxation the first $100,000 of paper and ink consumed annually by each publication, does Minn. Stat. §297A.14 deny equal protection of the laws and violate the Fourteenth Amendment by effectively imposing a graduated tax on the volume of a publisher's business activity?

4a. If a tax on the sale of newspapers would abridge freedom of the press, can Minnesota constitutionally impose a special "compensating use tax" under Minn. Stat. §297A.14 upon the paper and ink consumed by the tax-exempt newspapers?

b. Assuming that a tax on the sale of newspapers would be constitutional, can Minnesota, consistent with the First and Fourteenth Amendments, impose pursuant to Minn. Stat. §§297A.14 and 297A.25 a use tax as a substitute for a sales tax upon newspaper publishers, whereas other industrial users of paper and ink pay no use tax but their products are subject to sales tax, when the differing tax treatment is not necessary to accomplish a compelling state interest?

LIST OF PARTIES

In addition to the parties contained in the caption of this case in this Court,[1] the Minnesota Civil Liberties Union appeared as *amicus curiae* in support of appellant before the Minnesota Supreme Court.

[1] Appellant has no parent company. Its sole subsidiary (except wholly owned subsidiaries) is Information Publishers, Inc., a Minnesota corporation. Appellant is affiliated with the Des Moines Register and Tribune Company by common individual shareholders and by the ownership by the Des Moines Register and Tribune Company of 13% of appellant's outstanding stock.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Minneapolis Star and Tribune Company ("Star Tribune"), appellant herein, appeals from a January 5, 1982, judgment of the Minnesota Supreme Court upholding the constitutionality of Minn. Stat. §297A.14, which taxes newspapers' consumption of paper and ink in excess of $100,000 per year. The challenged use tax affects only a few publishers of Minnesota's largest daily newspapers; 97 percent of the State's publishers pay no such tax.

The Minnesota Supreme Court's opinion (A-1-19) is published at 314 N.W.2d 201 and at 7 Med. L. Rptr. 2579. The opinion of the Hennepin County District Court (A-49-66) in favor of Star Tribune has not been reported.

GROUNDS OF JURISDICTION

Star Tribune commenced this tax refund action in the Minnesota State courts, specifically challenging the validity of Minn. Stat. §§297A.14 and 297A.25 on the ground that these State statutes are repugnant to the freedom of press and equal protection clauses of the First and Fourteenth Amendments to the United States Constitution. The Minnesota Supreme Court upheld the challenged statutes, reversing a judgment of the Hennepin County District Court which had held the challenged statutes invalid on all grounds asserted.

This Court has jurisdiction by appeal pursuant to 28 U.S.C. §1257(a). The judgment appealed from was entered on January 5, 1982. (A-66.) Notice of appeal to this Court was duly served on all parties on March 10, 1982, and timely filed in the Minnesota Supreme Court on March 12, 1982. (A-68.) See 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section One, Fourteenth Amendment, United States Constitution:

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

The full text of the relevant Minnesota statutes is set forth in the Appendix (A-70-90). The statutory provision most directly at issue in this appeal is the following paragraph of Minn. Stat. §297A.14 (1974):

"Notwithstanding any other provisions of sections 297A.01 . . . to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in Section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section."

STATEMENT OF THE CASE

This appeal involves Star Tribune's claim for a refund of $874,265.04 of use taxes paid to Minnesota on paper and ink consumed in producing publications from January 1, 1974, through May 31, 1975. A refund claim was filed with the Sales and Use Tax Division of the Minnesota Department of Revenue on August 5, 1975, and was denied the next day. Star Tribune commenced this tax-refund action on August 27, 1975, pursuant to Minn. Stat. §297A.35.

During 1974 and 1975, Star Tribune published the morning *Minneapolis Tribune* six days a week and Sunday, and the evening *The Minneapolis Star* six days a week. Both newspapers are "publications" as defined in Minn. Stat. §297A.25, subd. 1 (i), and are Minnesota's two largest-circulation paid-subscription daily newspapers.

In 1967, Minnesota for the first time imposed a tax on the sale of tangible personal property. (1967 Minn. Laws, 1st Sp. Sess., Ch. 32.) The tax rate began at 3 percent, rose to 4 percent in 1971 (A-74) and to 5 percent in 1981 (A-2, n.1).

Section 14 of the 1967 Act (Minn. Stat. §297A.14) established a use tax payable on "the privilege of using, storing or

consuming in Minnesota tangible personal property," unless the sales tax had been paid on this property. Minnesota explicitly characterizes the use tax as "a compensating or complementary tax." See 14 Minn. Code of Agency Rules, Tax S & U 300 (1979).

The 1967 Act totally exempted, first, the sale of publications and the sale of materials used to produce publications, Minn. Stat. §297A.25, subd. 1 (i); and second, the sale of materials used or consumed in the industrial production of personal property intended ultimately to be sold at retail, Minn. Stat. §297A.25, subd 1 (h). For convenience, Star Tribune will refer to these two exemptions as the "publications exemption" and the "industrial user exemption."

Effective November 1, 1971, the publications exemption was amended to exclude the use of paper and ink consumed in producing publications. (A-77.) Minnesota thereby imposed a use tax on all such paper and ink. The 1971 Legislature did not change the exemption for industrial users, whose consumption of paper, ink and other products continued to be exempt from any use tax regardless of whether sales of their end products were subject to, or exempt from, the sales tax.

Effective January 1, 1974, the publications exemption was again amended so as to impose the use tax on consumption of paper and ink by publications only to the extent that the cost of those products consumed in any calendar year exceeded $100,000 per publication. As a consequence, 97 percent of Minnesota publishers pay no use tax; only "large Minnesota publishers"—who consume more paper and ink because they pub-

lish more pages, more often, to more people[2]—pay any use tax on their consumption of paper and ink.

During 1974 and 1975, approximately 400 paid-circulation newspapers were published in Minnesota. Approximately 90 percent had publication schedules of twice a week or less; none of these newspapers consumed $100,000 of paper and ink in either year, and thus none paid use tax on its consumption of paper and ink. In each year, 29 daily newspapers were published in Minnesota, six in the three largest metropolitan areas (Minneapolis, St. Paul, and Duluth). In 1974, only 11 publishers of those daily newspapers paid a use tax on paper and ink; in 1975, only 13 did so. In both years, Star Tribune paid nearly two-thirds of all use taxes collected from Minnesota newspapers.[3]

Thus, during 1974 and 1975, the use tax in question was imposed upon only 3 percent of all Minnesota newspaper publishers. During those years, no daily newspaper with a circulation of less than 12,500 paid any of this tax while all but one daily newspaper with a circulation greater than 12,500 paid some use tax in one year or the other. The amounts of use tax paid in 1974 varied widely, from $608,634 paid by Star Tribune to $120 paid by the *Fergus Falls Daily Journal*. (A-5-6, nn. 4, 5.)

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[2] Publishers can increase the flow of information to the public by publishing more pages, by increasing the frequency of publication or by increasing circulation. Consequently, each activity is protected by the First Amendment. The Minnesota Supreme Court appears to have assumed that only increasing circulation was protected activity. (A-15-16.) That assumption is mistaken. For example, in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), this Court held that the First Amendment prohibited government regulation of editorial decisions on the *size* as well as the content of a newspaper.

[3] During calendar year 1974, Star Tribune paid $608,634 of the $893,355 in total taxes collected, or 68 percent. (A-5, n.4.) During calendar year 1975, Star Tribune paid $636,113 of the $944,055 in total taxes collected, or 67 percent. (A-6, n.5.)

On May 30, 1980, Hennepin County District Judge Donald T. Barbeau granted Star Tribune's motion for summary judgment, holding the challenged tax unconstitutional as an abridgement of freedom of the press and as a denial of equal protection under both the federal and state constitutions. He concluded:

> The challenged use tax is not . . . a tax of general application. It is a limited, special tax, in its effect in the nature of a license tax, which abridges the freedom of the press in four ways:
>
> First, it taxes a select group of Minnesota publishers, leaving other Minnesota publishers free of its burden. This effect results from the $100,000 exemption.
>
> Second, it is specifically and exclusively directed at publications in general; no other industrial users of paper and ink products are subject to this use tax.
>
> Third, its direct tendency, if the tax is to be avoided, is to restrict circulation and thereby reduce the dissemination of information to the general public.
>
> Fourth, it is the practical and legal equivalent of a direct tax on the exercise of a First Amendment right because of its special and limited impact. (A-65-66.)

The State appealed, and the Minnesota Supreme Court reversed. (A-1-19.) That court characterized the tax as an ordinary form of taxation for the support of government, whose classifications were justified by the compelling government purpose of revenue-raising. It stated:

> The history and setting of section 297A.14 . . reveal that it is not a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers

> distributed by publishers such as Star Tribune. It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota. Unlike the type of tax found to be unconstitutional in *Grosjean* [*v. American Press Co.*, 297 U.S. 233 (1936)], sales and use taxes are now commonplace and readily accepted. (A-12.)

The Minnesota Supreme Court justified the discriminatory use tax classification between publishers and nonpublishers on the ground that the goods produced by nonpublishers are subject to retail sales tax, whereas publications are statutorily exempt from any retail sales tax. The Court speculated that this arrangement "may be a result of the difficulties and expense of collecting sales tax upon sales of such low-priced items [publications]." (A-13.)

Having concluded that the use tax on publications' consumption of paper and ink "is constitutionally justified . . . as a revenue-raising measure," the Court held that the "$100,000 exemption itself is justified if it is an integral part of the sales and use tax system." (A-17.)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. The Minnesota Supreme Court Misapplied the Constitutional Standard of Exacting Scrutiny.

This appeal presents important and substantial federal questions concerning the constitutionally permissible nature and extent of taxation upon the uniquely expressive features of newspapers.

According to a recent survey conducted by the American Newspaper Publishers Association, the majority of states (34) impose no sales or use tax whatsoever on newspaper advertising, circulation or consumption of paper. *Presstime*, December 1981 at 16. In an era when legislatures are seeking new sources of revenue and when large-circulation newspapers are popular targets of public and political criticism, Minnesota has devised a way to undermine much of the opposition to a new tax on the press by imposing it only upon a small group—large publishers. The $100,000 exemption eliminates the active opposition of most Minnesota publishers, including the small newspapers which are often the most vocal critics and supporters of rural legislators.

The Minnesota Supreme Court exacerbated the problems of this narrow, discriminatory tax on large newspapers by misapplying the constitutional standard of review. Taxation and regulation which infringe First Amendment rights are subject to strict or exacting scrutiny. *Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4072 (1981); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 99, 101 & n.8 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The State may justify limitations on First Amendment rights or discriminatory classifications under this standard only by showing that they are necessary or essential to accomplish a compelling state interest. *United States v. Lee*, 50 U.S.L.W. 4201, 4203 (1982); *Police Department of City of Chicago v. Mosley, supra* at 99; *In re Griffiths*, 413 U.S. 717, 721-22 (1973).

At oral argument before the Minnesota Supreme Court, counsel for the State conceded that "it would be very difficult to uphold this particular statute under the strict scrutiny stan-

dard of review." (A-29, 34.) Although the Minnesota Supreme Court purported to apply a "strict standard" of review (A-8, 12), in fact it applied only part of the test. It found a "compelling government purpose of revenue-raising" (A-1), but never expressly found that the discriminatory classifications of this particular tax were necessary to accomplish that purpose.

This superficial approach is clearly something short of strict scrutiny and in fact would shield any tax from successful judicial challenge. All taxes raise revenue, and all tax laws can be justified on that ground. Proponents of the Stamp Act of 1712 touted it as a way to keep the newspapers in hand and at the same time to raise large supplies of money for Queen Anne to fight the War of the Spanish Succession. J. B. Williams, "History of English Journalism" (1908), *quoted in Grosjean v. American Press Co.*, Appellees' Brief at 49-50; F. Siebert, *Freedom of the Press in England 1476-1776*, 309 (1952). Long after the censorious officials who enacted the Stamp Act's "taxes on knowledge" were dead and buried, the English government opposed efforts to repeal the taxes on knowledge because of the revenue loss which repeal would cause. *See, e.g.*, C.D. Collet, 1 *History of the Taxes on Knowledge*, 167-68 (1899); 2 *id.*, 67, 73, 96-97. That argument helped to delay repeal of the last of the taxes on knowledge until 1861, almost 150 years after their first enactment. 2 *id.* 119-34. In America, however, the First Amendment protected the press from the taxes on knowledge. *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936). In *Grosjean*, this Court invalidated, as an abridgement of freedom of the press, a Louisiana license tax on advertising revenues which its sponsors had described as a measure to make newspapers pay a "license to do busi-

ness like everybody else does." *See Grosjean v. American Press Co.*, Transcript of Record at 47.

Unless the decision below is reversed, other States may be tempted to follow Minnesota's example. States must not raise revenue in ways which unduly infringe upon First Amendment activities. Minnesota failed to establish that any aspect of the challenged use tax was necessary to accomplish a compelling state interest. This challenged censorious and discriminatory taxation of newspapers merits plenary review, if not summary reversal, by this Court.

II. The Challenged Use Tax Abridges Freedom of the Press by Imposing a Classic "Tax on Knowledge" in Violation of *Grosjean v. American Press Co.*

The form and impact of the Minnesota use tax here at issue are strikingly similar to those of the Louisiana license tax which this Court invalidated in *Grosjean v. American Press Company*, 297 U.S. 233 (1936). In *Grosjean*, 13 newspapers were subject to a 2 percent license tax on gross receipts derived from advertising, while at least 124 newspapers paid no such tax, because the tax applied only if weekly circulation exceeded 20,000. *Id.* at 241. In the present appeal, approximately 3 percent of all newspaper publishers in Minnesota paid the use tax in amounts varying from $120 to $636,113, while the remaining 97 percent, with circulations of 12,500 per day or less, paid no use tax. (A-4-7.) Here, as in *Grosjean*, small rural publishers pay no tax, while large metropolitan publishers shoulder the entire tax burden.

In *Grosjean*, this Court invalidated the tax as an unconstitutional abridgement of freedom of the press. Its form demonstrated the Louisiana license tax to be a successor to the En-

glish and early American efforts to censor or control the press by taxation. 297 U.S. at 245-51. These "taxes on knowledge" took three principal forms: a stamp tax on the circulation of newspapers, a tax upon advertisements, and a tax upon paper itself. C. Duniway, *The Development of Freedom of the Press in Massachusetts*, 119-20, 133-37 (1906); T. May, 2 *Constitutional History of England*, 213-15 (1891); F. Siebert, *Freedom of the Press in England, 1476-1776*, 306-22 (1952). The First Amendment was enacted to preclude the government from adopting such taxes. 297 U.S. at 249.

The Louisiana tax in *Grosjean* combined two forms of taxes on knowledge, first by directly taxing advertisements, and second by tying that tax to increased circulation. Minn. Stat. §297A.14 embodies the third classic form of the taxes on knowledge—a tax on paper. Historically, a tax on paper was no less objectionable than a newspaper stamp tax and a tax on newspaper advertising.[4] As this Court recognized in *Grosjean*, the history of the First Amendment teaches that the very form of the taxes on knowledge renders them unconstitutional. 297 U.S. at 250.

The Minnesota Supreme Court attempted to distinguish *Grosjean* by referring to the peculiar history and setting of the

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[4] T. May, 2 *Constitutional History of England*, 215 (1891) ("Cheapness and expansion were evidently becoming the characteristics of the periodical press; to which every tax, however light, was an impediment. Hence a new movement for the repeal of all 'taxes on knowledge,' led by Mr. Milner Gibson, with admirable ability, address, and persistence. In 1853, the advertisement duty was swept away; and in 1855, the last penny of the newspaper stamp was relinquished. Nothing was now left but the duty on paper; and this was assailed with no less vigor. Denounced by penny newspapers, which the repeal of the stamp duty had called into existence; complained of by publishers of cheap books; and deplored by the friends of popular education, it fell, six years later, after a parliamentary contest memorable in history. And now the press was free alike from legal oppression and fiscal impediments.") (footnote omitted).

Louisiana gross receipts tax on newspaper advertising revenues, namely that the tax apparently had been enacted to penalize large newspapers that were political opponents of Governor Huey Long. (A-9-10.) However, *Grosjean* contained only a single veiled reference to the "present setting" of the Louisiana tax, 297 U.S. at 250; the primary reason for invalidating the tax was the lengthy history and potential of abuse of such taxes in general, and not the specific punitive intent of the particular Louisiana tax in question. *See also City of Tampa v. Tampa Times*, 153 Fla. 709, 15 So.2d 612, 613 (1943).

Proof of specific punitive intent is not a prerequisite for invalidating taxes which have a discriminatory impact upon the press. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (Exacting scrutiny is necessary "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . ."); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963) (Brennan, J.) ("Thus it is no answer to the constitutional claims asserted by the petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action . . . Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived *to have the consequence* of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.") (emphasis added).

There is no official legislative history, apart from that which may be imputed from the changes in the statutory language, to establish the purpose of this challenged use tax.[5] It should not matter whether the tax seeks to achieve a legitimate objective but nevertheless has a significant effect upon freedom of expression, or whether the revenue-raising objective is a mere pretense and Minnesota actually seeks to control expression. Because intent may be ambiguous or impossible to prove in such cases, the ultimate issue must be whether the tax infringes upon freedom of expression. T. Emerson, *The System of Freedom of Expression*, 413-14 (1970). By its very na-

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[5] In Appellant's Informal Brief before the Minnesota Supreme Court at page 17, the State concedes: "The lack of any extant legislative history regarding the $100,000 exclusion makes it impossible to know precisely what purposes the legislature had in mind when it adopted the provision in 1973." The same vacuum exists with respect to the 1971 legislation. The absence of legislative history is the State's own responsibility. The Minnesota Legislature is well aware of how to make clear the objectives of its legislation, particularly when it anticipates litigation. *See Contos v. Herbst*, 278 N.W.2d 732, 734-35, 738 (Minn.), *appeal dismissed* 444 U.S. 804 (1979). It is also well aware of how to obscure its objectives. For example, both the Minnesota Senate and House of Representatives, by rule, provide for the recording of certain legislative proceedings and the preservation of the tape recordings in the Minnesota State Legislative Reference Library; however, those same rules expressly provide that the discussions on the tapes are not to be admissible in any court or administrative proceedings on the issue of legislative intent. *See* Rule 1.18 of the Rules of the Minnesota House of Representatives (". . . Discussion preserved under this rule is not intended to be admissible in any court or administrative proceeding on an issue of legislative intent."); Rule 65 of the Permanent Rules of the Senate (". . . It is the intention that testimony and discussion preserved under this rule not be admissible in any court or administrative proceeding on an issue of legislative intent.").

When legislation is subject to strict or exacting scrutiny, as is the challenged use tax here, proferred explanations of legislative purpose based on speculation and unsupported by evidence in the legislative record will not suffice. This Court does not accept mere recitations of benign purposes for legislation which impairs fundamental rights or involves suspect classifications, when those explanations are supplied only by hindsight or as an afterthought. *See, e.g., Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 447-55 (1972).

ture, a tax on paper and ink consumed in publishing newspapers restricts the dissemination of information, and thereby abridges freedom of the press.

III. The $100,000 Exemption Restricts the Speech of Large Publishers and Conflicts With *Buckley v. Valeo* and Other Decisions of This Court.

The Minnesota Supreme Court suggested that the annual $100,000 per publication exemption feature of the challenged use tax "may be justified as a legislative policy to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered)." (A-17.) *Mabee* is readily distinguishable because the particular provision of the Federal Fair Labor Standards Act there involved "was inserted to put those papers [small weeklies and semi-weeklies] more on a parity with other small town enterprises." 327 U.S. at 184. Minnesota's sales and use taxes contain no broad "small enterprise" exemption. The purpose of the challenged statute can be no broader than its actual effect: it favors small publishers and penalizes large publishers. In the present context, either effect is unconstitutional.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court struck down provisions of the federal Election Campaign Act which imposed $1,000 limits on independent expenditures to advocate the election or defeat of clearly identified candidates for federal office. It rejected arguments that the government had a legitimate interest in equalizing the relative ability of individuals and groups to influence the outcome of elections, and stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the rela-

> tive voice of others is wholly foreign to the First Amendment. . . ." (424 U.S. at 48-49.)

Mr. Justice Powell expressed similar views on behalf of this Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), when he rejected the argument "that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members." *Id.* at 791 n. 30. *See also Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4072 (1981) (Burger, C.J.).

These principles of constitutional law would prohibit Minnesota from forbidding a publication from consuming more than $100,000 of paper and ink annually. The challenged use tax involved here admittedly does not go that far, which prompted the Minnesota Supreme Court to distinguish *Buckley* by stating:

> By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount. (A-19.)

However, the constitutional principles espoused in *Buckley* and *First National Bank* go beyond outright prohibition. It is just as unconstitutional for government to restrict or limit the circulation of information by taxation as it is to prohibit the circulation. *Grosjean v. American Press Co.* Taxation may be less drastic than prohibition, but it may be no less constitutionally invalid.

As a result of the $100,000 exemption, Minnesota imposes the heaviest use tax burden upon those newspapers which publish the most pages, most often, to the most people. Such a tax clearly penalizes the circulation of information. It is the fact of

the improper tax burden, and not its amount, that is the objectionable factor. L. Tribe, *American Constitutional Law*, §16-8 at 1005 n. 18 (1978).

IV. The $100,000 Exemption Denies Equal Protection of the Laws by Imposing a Graduated Tax on Business Activity, and Conflicts with *Stewart Dry Goods v. Lewis*.

As the Minnesota Supreme Court acknowleged, the "practical effect of this [$100,000-per-publication] exemption during 1974 and 1975 was to relieve from payment of use tax all but a dozen or so publishers." (A-14.) The challenged use tax establishes two rates of taxation for otherwise identical First Amendment activities, depending only upon the identity of the publisher and the amount of consumption of paper and ink. The $100,000 exemption also produces a steeply graduated effective rate of use tax on a publisher's total consumption of paper and ink. Star Tribune, the largest Minnesota newspaper publisher, paid tax on its total use of paper and ink at the overall rate of 3.95 percent, while the second-largest publisher paid at the rate of 3.85 percent, the two next-largest publishers at about 3.33 percent, and the smallest publisher paying any tax at all paid at an effective overall rate of 0.117 percent—all under an ostensible flat rate "nondiscriminatory" tax of 4 percent. (A-90-92).

This Court has held that the gross sales of a merchant do not bear a constant relation to its net profits, and a graduated sales tax therefore unconstitutionally denies equal protection of the laws. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 558, *reh. denied*, 295 U.S. 768 (1935). Similarly, a merchant's gross expenses—such as a publisher's consumption of paper and ink—do not bear a constant relation to its net profits. The re-

cent, much-publicized failures of major daily newspapers in such cities as Washington and Philadelphia illustrate the principle that a large-circulation newspaper is not necessarily a profitable newspaper. *See* "Washington Star Is to Shut Down After 128 Years," *The New York Times*, July 24, 1981, p. 1, col. 2; "Philadelphia's Bulletin, 1847-1982," *Newsweek*, February 8, 1981, p. 95, col. 2. A graduated tax upon large publishers' consumption of paper and ink therefore either restricts their size, frequency or circulation, or enhances the relative position of their smaller-circulation counterparts.

Although in 1939 it had endorsed the reasoning of *Stewart Dry Goods*,[6] the Minnesota Supreme Court rejected it here, stating:

> Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets. Rather, the use tax is constitutionally justified . . . as a revenue-raising measure. The $100,000 exemption itself is justified if it is an integral part of the sales and use tax system. (A-17.)

Such semantic distinctions are squarely contrary to this Court's reasoning in *Stewart Dry Goods*: "In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect." 294 U.S. at 555.

Apparently in an effort to explain how the $100,000 exemption is "an integral part of the sales and use tax system," the Minnesota Supreme Court stated that "the legislature must classify or grant exemptions to insure that the burden upon

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[6] In *National Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360 (1939), *vacated and remanded*, 309 U.S. 551, *affirmed on remand*, 208 Minn. 607, 294 N.W. 230 (1940).

the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state." (A-18.) That speculation has no force whatsoever under the present circumstances. At a 4 percent tax rate, the $100,00 exemption confers a $4,000 tax benefit on each publication; in 1974, the State collected $120 in use taxes from the *Fergus Falls Daily Journal* (see A-5, n.4). In any event, administrative convenience simply is not a compelling state interest which will justify a classification which affects fundamental freedoms, including freedom of the press. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

V. When It Has Chosen Not to Tax the Sale of Newspapers, Minnesota Cannot Impose a "Compensating" Use Tax Upon Paper and Ink if a Sales Tax Upon Newspapers Would Abridge Freedom of the Press, Nor Can it Create Discriminatory Classifications Between Publishers and Nonpublishers Which Are Not Necessary to the Accomplishment of a Compelling State Interest.

The Minnesota Supreme Court acknowledged that the challenged statute taxes newspaper publishers in a different manner than other industrial users of paper and ink (A-8), but upheld the statute because publishers paid a use tax while other industrial users' goods were subject to sales tax. This rationale requires two major assumptions: that a sales tax on publications would withstand constitutional scrutiny, and that the use tax imposes the same burden on newspapers that the sales tax imposes on other industrial users. Neither assumption is valid.

Although the constitutionality of a sales tax on newspapers is essential to the Minnesota Supreme Court's reasoning, it did

not directly address that issue. (A-13, n.10.) This Court need not decide this issue if the challenged use tax is invalid on the other grounds raised herein. Star Tribune submits, however, that a sales tax on publications—which the Minnesota legislature has chosen *not* to enact—would be unconstitutional. The sale of newspapers or other information is an activity protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness*, 49 U.S.L.W. 4762, 4764 (1981); *Smith v. California*, 361 U.S. 147, 150 (1959). By imposing a sales tax upon the exchange of newspapers for consideration, the State would create a financial obstacle to the dissemination of information; if the buyer cannot or will not pay the additional amount necessary to satisfy the sales tax, the transfer of information will not occur. Minnesota prohibits the seller from absorbing the amount of sales tax. Minn. Stat. §297A.03. Although this Court never has given plenary consideration to the constitutionality of a direct sales tax on newspapers, it has invalidated state-created financial obstacles to communication in the form of license taxes. *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (city could not require distributor of religious literature to obtain occupational license); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (city could not require occupational license for Jehovah's witness who distributed religious literature door-to-door and solicited purchases of books and pamphlets). *Jones v. City of Opelika*, 319 U.S. 103 (1943), *reversing and adopting dissenting opinions*, 316 U.S. 584 (1942) (invalidating annual occupational license to sell religious books).

The Minnesota Supreme Court found these cases inapposite on the authority of *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, *appeal dismissed*, 358 U.S. 39 (1958). (A-14). *Steinbeck* involved a "privilege tax" imposed on gross receipts received from trades, professions or commercial activities, in-

cluding the profession of author. As with the taxes measured by gross business receipts involved in *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947), and *Giragi v. Moore*, 64 P.2d 819 (Ariz.), *appeal dismissed*, 301 U.S. 670 (1937), the *Steinbeck* tax fell upon the accumulation of income by all businesses. As with any income tax, the financial burden on the press imposed by these taxes might have an indirect impact upon the amount of money they may spend on their business; unlike a direct sales tax, however, the gross receipts taxes are not interposed at the focal point of the constitutionally protected activity: the transfer of information.

If a sales tax on publications would be unconstitutional, Minnesota cannot impose it by indirection through deleting a statutory exemption from tax. The ability to strip the press of an existing statutory immunity from taxation, at any time and for any reason, raises the same specter of censorious abuse as does the ability to levy a special tax upon the press. *Speiser v. Randall*, 357 U.S. 513 (1958). Nor can Minnesota circumvent the invalidity of a sales tax on publications by imposing a special "compensating" use tax to which no other similarly situated taxpayer is subject. *Cf. Phillips Chemical Co. v. Dumas Ind. School Dist.*, 361 U.S. 376, 382-83 (1960); *Miller v. City of Milwaukee*, 272 U.S. 713 (1927).

Even assuming, however, that a sales tax on publications would be constitutional, the challenged use tax nevertheless can be upheld only if its burden is equivalent to that of a sales tax, because *Grosjean* prohibits special taxes which can be used to abridge freedom of the press. The challenged use tax does not fit neatly into "a general system of sales and use taxation to which most goods (other than food, clothing and medicine) are subject in Minnesota." (A-12.) Rather, it has unique

features which distinguish it from other Minnesota sales and use taxes.

First, no other general or special provision of Minnesota's sales and use tax laws provides a significant exemption based upon the dollar amount of purchase. That exemption conflicts with the supposed revenue-raising purpose of the tax.[7] The total taxes *collected* under this use tax on paper and ink during the years at issue were only about one-half of the potential revenue tax *loss* caused by the $100,000 exemption.[8] Even limiting consideration of the effect of the $100,000 per-publication exemption to those newspapers which actually paid some tax, the revenue loss from the exemptions for the 15 tax-paying newspapers in 1974 and the 16 tax-paying newspapers in 1975 nearly equalled the total taxes paid by all newspapers except the daily newspapers in Minneapolis and St. Paul.[9] If the $100,000 exemption were extended to all Minnesota taxpayers, the State would have lost 40 to 44 percent of all the sales and use tax revenues which it collected in the 1973-1975 period. (See Star Tribune's Memorandum in Support of Motion for Summary Judgment, Appendices B, C, D, and F.)

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[7] At a use tax rate of 4 percent and an exemption of $100,000 per publication, the revenue loss is $4,000 per publication. With approximately 400 Minnesota publications, the potential annual revenue loss is 400 times $4,000, or $1.6 million. Because not all publications consume $100,000 of paper and ink products, the actual revenue loss each year is somewhat less.

[8] Total revenues collected were $893,355 in 1974 and $944,055 in 1975. (A-5-6, nn. 4 & 5).

[9] In 1974, Minnesota collected $82,473 from all newspapers except the daily newspapers in Minneapolis and St. Paul. (A-5, n.4.) That year, 15 publications reached the $100,000 threshold and paid some tax. At $4.000 per publication, the $100,000 exemption cost Minnesota $60,000 in lost revenues that year from the taxpaying publishers alone. Similarly, in 1975, Minnesota collected $90,302 from all newspapers except the daily newspapers in Minneapolis and St. Paul, (A-6, n.5) while revenues lost from the 16 exemptions were $64,000. These figures do not include the potential revenues actually lost from other publications which failed to reach the $100,000 threshold and consequently paid no tax whatsoever.

The challenged tax on paper and ink also distorts the traditional function of a compensating use tax. A compensating use tax is a fairly common feature of a State's overall sales and use tax statutes, and is "intended to protect both local merchants and the local treasury by taxing the intrastate use of property which would have been subject to the sales tax had it been purchased within the state." Note, *Economic Neutrality and the Compensating Use Tax*, 16 Stan. L.Rev. 1016 (1964) (footnotes omitted). In contrast, the use tax on paper and ink does not reach out-of-state transactions at all. Only Minnesota publishers pay the use tax, but all publications sold in Minnesota are exempt from the sales tax, regardless of where they are published. Minn. Stat. §297A.25, subd 1 (i). If Minnesota attempted to impose greater taxes on foreign businesses than on domestic business, it would violate constitutional protections of interstate commerce under principles articulated by this Court since at least *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Similarly, this Court should hold that Minnesota has violated the First Amendment by singling out its domestic publishers to pay higher taxes than foreign publications doing business within the State based upon identical activity. To the extent that proof of a discriminatory motive is necessary in this case, it may be inferred from the fact that Minnesota's domestic publishers which are subject to the tax are more likely to criticize the State government on a regular basis than are the foreign publishers which are exempt from sales and use taxes.

Finally, the use tax on newspapers' consumption of paper and ink is a striking departure from what the Minnesota Supreme Court describes as a "statutory scheme . . . to devise a unitary tax which exempts intermediate transactions and imposes it only on sales when the finished product is purchased by the ultimate user." *Standard Packaging Corp. v. Commis-*

sioner of Revenue, 288 N.W.2d 234, 239 (Minn. 1979). The "industrial use" exemption applies to all materials used or consumed in agricultural or industrial production of personal property "intended to be sold ultimately at retail," but does not require that the ultimate sale at retail itself be subject to tax. The industrial user of paper and ink pays no tax on his consumption, regardless of whether his final product is a taxable roll of wrapping paper, a tax-exempt milk carton (Minn. Stat. §297A.25, subd. 1 (a)), or a tax-exempt school textbook (Minn. Stat. §297A.25, subd. 1 (v)). Of all instances in which the sale of a final product is tax-exempt, only publications are subjected to a "compensating" use tax on consumption of materials used to make that final product.

The Minnesota Supreme Court did not address the issue of the necessity of the disparate treatment between publishers and other industrial users. Its sole suggested reason for subjecting newspapers to a use tax rather than a sales tax was "the difficulties and expense of collecting sales tax upon sales of such low-priced items". (A-13.) However, the State taxes the sales of many other low-priced items as diverse as pipe cleaners, picture hangers, toothpicks, paper clips and six-inch plastic rulers; it presently exempts only sales where the sales price is nine cents or less. Minn. Stat. §297A.03, subd. 2 (1981).

The challenged statute's disparate treatment of publishers and other industrial users of paper and ink certainly is not necessary to the accomplishment of any compelling state interest, and must be invalidated. A State may not constitutionally tax publishers on a different basis and at a different rate than it taxes other persons, simply by codifying the publishers' tax as part of a broad taxing statute. Minnesota has made a policy decision, supported by constitutional principles (as even the State's counsel concedes, A-34-35), to exempt newspapers from

its sales tax. There is no compelling state purpose for Minnesota to circumvent that exemption by imposing a discriminatory use tax upon paper and ink consumed by large Minnesota newspapers.

CONCLUSION

The decision of the Minnesota Supreme Court undermines fundamental First Amendment principles. The questions presented by this appeal are substantial. Star Tribune urges this Court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

Respectfully submitted,

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81-1839

Supreme Court, U.S.
FILED
APR 2 1982
ALEXANDER L. STEVAS
CLERK

No._____

IN THE

Supreme Court of the United States

October Term, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

APPENDIX A

Opinion of Minnesota Supreme Court
No. 51616
STATE OF MINNESOTA
IN SUPREME COURT

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Respondent,

vs.

COMMISSIONER OF REVENUE,
Appellant.

Filed December 17, 1981
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Minn. Stat. § 297A.14 (1980), imposing a use tax on paper and ink consumption above $100,000 on some publications, is not an unconstitutional burden upon freedom of the press under the principles of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); nor is there a denial of equal protection as a result of the fact that section 297A.14 affords differing tax treatment to newspaper publishers and other industrial users, or to large and small publishers. This use tax is an ordinary form of taxation for the support of government. The classifications within this tax are justified by the compelling government purpose of revenue raising.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

SHERAN, Chief Justice.

The issue in this case is whether the State of Minnesota may, consistent with both the federal and state constitutions, impose a use tax on consumption of ink and paper which, due to an exemption in the law, is paid by some newspapers and publications but not by all. The challenged statute in force at the times relevant here, Minn. Stat. § 297A.14 (1980), provided that "the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication defined in section 297A.25, subdivision 1, clause (i)" was subject to the general use tax imposed by the section: a tax on "using, storing or consuming in Minnesota tangible personal property" at a rate of 4% of the sales price of sales at retail of the item.[1] Section 297A.25, subd. 1(i), states that a "publication" is a legal newspaper, defined by Minn. Stat. § 331.02 (1980), or any other publication "regularly issued at average intervals not exceeding three months." Respondent, a newspaper publisher consuming over $100,000 in paper and ink products annually, challenges the use tax as an unconstitutional burden upon freedom of the press, protected by U.S. Const. amend. I, XIV, and Minn. Const. art. 1, § 3, and a denial of equal protection of the law, provided by U.S. Const. amend. XIV, § 1, and Minn. Const. art. 10, § 1.

Respondent Minneapolis Star and Tribune Company (Star Tribune) sought a refund from the state department of

[1] The rate of this use tax has now been raised to 5% for the period after June 30, 1981, and prior to July 1, 1983. Act of June 6, 1981, ch. 1, art. IV, § 5, 1981 Minn. Sess. Law Serv. (West). The $100,000 figure and relevant wording of section 297A.14 have not been altered. *Id.*

revenue of $874,265.04, with interest, in use taxes paid over a 17-month period from January 1, 1974, to May 31, 1975. The refund was denied and respondent appealed the denial in Hennepin County District Court pursuant to Minn. Stat. § 297A.35, subd. 2 (1980). The district court granted summary judgment to Star Tribune, declaring the use tax unconstitutional on all suggested grounds. We reverse.

I.

The use tax challenged here is part of a system of sales and use taxes initially created by the state legislature in the Tax Reform and Relief Act of 1967. Act of June 1, 1967, ch. 32, art. 13, 1967 Minn. Laws Sp. Sess. 2143, 2177. The law then wholly exempted from use tax the gross receipts from the sale, storage, use or consumption of all tangible personal property, including paper ink products, used in or consumed in any publication regularly issued at average intervals not exceeding three months. *Id.* § 25, subd. 1(i), at 2186. The publications themselves were also exempt from sales tax. *Id.* The rate of sales and use tax was 3% at that time. *Id.* § 2, at 2179; § 14, at 2182.

Effective November 1, 1971, the paper and ink products exemption for publications was eliminated and all paper and ink products were subject to the use tax. Act of Oct. 30, 1971, ch. 31, art. 1, § 5, subd. 1(i), 1971 Minn. Laws Sp. Sess. 2561, 2565.

The use tax on all paper and ink products obtained until January 1, 1974. On that date, the legislature put into effect the section challenged here, which granted an exemption from the use tax only for the first $100,000 of paper and ink products consumed annually. Act of May 24, 1973, ch. 650, art. 13, § 1, 1973 Minn. Laws 1606, 1637 (codified at Minn. Stat.

§ 297A.14 (1980).[2] The consequence of this exemption was a $4,000 tax credit to newspapers and other publishers.[3] Publications remained exempt from sales tax.

Respondent Star Tribune is the publisher of two newspapers in the state, one a morning paper and the other an evening paper. During 1974 and 1975, Star Tribune published the morning paper seven days per week and the evening paper six days per week. Currently, Star Tribune publishes the morning paper seven days per week and the evening paper five days per week. The physical components of Star Tribune's newspaper are, of course, newsprint and ink, the two items subject to the use tax at issue.

In 1974, Star Tribune was one of 11 publishers of daily newspapers in the State of Minnesota that consumed paper and ink products in excess of $100,000 and therefore paid the

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[2] Minn. Stat. § 297A.14 (1980) reads in full:

297A.14 USING, STORING OR CONSUMING TANGIBLE PERSONAL PROPERTY; ADMISSIONS; UTILITIES.

For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 was paid on said sales price.

Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

Notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section.

(The statute was recently amended. *See* note 1 *supra*.)

[3] Publishers of more than one newspaper are entitled to a $100,000 exemption for each publication. Respondent Star Tribune is entitled to two such exemptions.

4% use tax on the amount above that figure.[4] That year there

[4] Respondent submitted the following data for 1974:

	City	Newspaper	Circulation	Taxes Paid on Newsprint and Ink
1,2	Minneapolis	Star (Evening)	255,964*	$608,634
		Tribune (Morning)	233,381*	
		Tribune (Sunday)	640,756*	
3,4	St. Paul	Dispatch (Evening)	125,129	$202,248
		Pioneer Press (Morning)	107,266	
		Pioneer Press (Sunday)	238,888	
5,6	Duluth	Herald (Evening)	22,120	$ 33,805
		News-Tribune (Morning)	53,559	
		News-Tribune (Sunday)	83,398	
7	Rochester	Post-Bulletin	33,175	$ 20,800
8	St. Cloud	Times	26,574	$ 14,388
9	Mankato	Mankato Free Press	24,488	$ 7,774
10	Winona	Winona Daily News	21,633	$ 3,043
11	Worthington	Worthington Daily Globe	17,131	$ 218
12	Willmar	West Central Daily Tribune	16,483	$ 1,444
13	Brainerd	Brainerd Daily Dispatch	13,461	-0-
14	Virginia	Mesabi Daily News	13,445	$ 881
15	Fergus Falls	Daily Journal	13,293	$ 120
16	Fairmont	Sentinel	13,000	-0-
17	Austin	Austin Daily Herald	12,797	-0-
18	New Ulm	New Ulm Daily Journal	12,300	-0-
19	Albert Lea	Evening Tribune	10,829	-0-
20	Red Wing	Republican Eagle	9,295	-0-
21	Hibbing	Hibbing Daily Tribune	9,278	-0-
22	Faribault	Daily News	8,861	-0-
23	Owatonna	People's Press	7,407	-0-
24	Bemidji	The Pioneer	6,650	-0-
25	Little Falls	Transcript	6,411	-0-
26	Marshall	Independent	5,630	-0-
27	International Falls	The Daily Journal	5,256	-0-
28	Waseca	Waseca's Daily Journal	4,856	-0-
29	Crookston	Crookston Daily Times	4,768	-0-
30	Stillwater	Stillwater Gazette	4,550	-0-
31	Minneapolis	Finance and Commerce	1,782	-0-

* Average paid circulation twelve (12) months ended March 31, 1974.

Plaintiff's Exhibit 3. The data was compiled under the direction of plaintiff's affiant, Robert M. Shaw, the manager of the Minnesota Newspaper Association.

were 388 paid circulation newspapers in the state, 29 of which were daily papers.

In 1975, Star Tribune was one of 13 publishers of daily papers paying any use tax on ink and paper products, out of a total of 374 paid circulation newspapers in the state, 29 of which were daily papers.[5]

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[5] Respondent submitted the following data for 1975:

	City	Newspaper	Circulation	Taxes Paid on Newsprint and Ink
1,2	Minneapolis	Star (Evening)	252,020*	$636,113
		Tribune (Morning)	229,769*	
		Tribune (Sunday)	619,154	
3,4	St. Paul	Dispatch (Evening)	120,288	$217,640
		Pioneer Press (Morning)	102,395	
		Pioneer Press (Sunday)	239,118	
5,6	Duluth	Herald (Evening)	21,855	$ 39,462
		News-Tribune (Morning)	51,369	
		News-Tribune (Sunday)	82,087	
7	Rochester	Post-Bulletin	34,675	$ 19,300
8	St. Cloud	Times	29,473	$ 12,613
9	Mankato	Mankato Free Press	24,545	$ 9,356
10	Winona	Winona Free Press	21,633	$ 1,691
11	Willmar	West Central Daily Tribune	17,375	$ 2,220
12	Worthington	Worthington Daily Globe	17,170	$ 926
13	Virginia	Mesabi Daily News	13,801	$ 2,225
14	Fergus Falls	Daily Journal	13,647	$ 208
15	Brainerd	Brainerd Daily Dispatch	13,440	$ 656
16	Fairmont	Sentinel	12,856	-0-
17	Austin	Austin Daily Herald	12,510	$ 1,645
18	New Ulm	New Ulm Daily Journal	12,501	-0-
19	Albert Lea	Evening Tribune	11,116	-0-
20	Red Wing	Republican Eagle	9,012	-0-

The data submitted by Star Tribune[6] show a rough correlation between volume of circulation and incidence and amount of use tax paid, but larger papers did not uniformly pay more use tax. In 1974, for instance, the Brainerd Daily Dispatch, a newspaper with a circulation of 13,461, paid no use tax, while the West Central Daily Tribune, circulation 16,483, paid nearly $1500 and the Worthington Daily Globe, circulation 17,131, paid just over $200. In addition to these data, respondent's affiant, Robert M. Shaw, the manager of the Minnesota Newspaper Association, stated that a newspaper published fewer than three times per week would not have consumed sufficient paper and ink to require payment of any use tax in 1974 and 1975. Respondent's data show that in 1974 and 1975 approximately 3% of all newspaper publishers in the State of Minnesota consumed paper and ink in excess of $100,000 annually and were therefore obligated to pay the use tax in amounts varying from $120.00 to $636,113.00. The remaining 97% paid no use tax.

21	Hibbing	Hibbing Daily Tribune	8,871	-0-
22	Faribault	Daily News	8,539	-0-
23	Owatonna	People's Press	7,177	-0-
24	Bemidji	The Pioneer	6,600	-0-
25	Little Falls	Transcript	6,437	-0-
26	Marshall	Independent	NA	-0-
27	International Falls	The Daily Journal	5,071	-0-
28	Waseca	Waseca's Daily Journal	4,825	-0-
29	Crookston	Crookston Daily Times	4,650	-0-
30	Stillwater	Stillwater Gazette	7,000	-0-
31	Minneapolis	Finance and Commerce	1,782	-0-

* Average paid circulation twelve (12) months ended March 31, 1975.

Plaintiff's Exhibit 4. This data was compiled in the same fashion as the data in footnote 4 *supra*.

[6] See footnotes 4 and 5, *supra*.

II.

The equal protection claim in this case is closely intertwined with the first amendment interests at stake. The use tax law, because it appears to treat newspaper publishers as different from industrial users of paper and ink products, may be an unconstitutional burden on newspaper publication, an expressive activity protected by the first amendment. Moreover, because it appears to treat some newspaper publishers as different from other newspaper publishers, the use tax may be unconstitutional as an unfair burden upon only a segment of the class of publishers. Although the parties have treated the equal protection and first amendment issues in separate portions of their briefs, we find that the analysis is inextricable. *See Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). We will consider the first amendment and the equal protection claims together here.

In considering each of respondent's arguments, we keep in mind the strict standard that must be applied when protected first amendment rights may be infringed. *Police Department of Chicago v. Mosley*, 408 U.S. at 101 and n.8; *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Big Mama Rag, Inc. v. United States*, 631 F. 2d 1030, 1035 (D. C. Cir. 1980). We afford the legislature broad discretion in enacting tax laws, but we recognize that "[i]t is settled that speech can be effectively limited by the exercise of the taxing power." *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

We first address the issue whether section 297A.14 is unconstitutional because it appears to tax newspaper publishers in a different manner than it taxes other industrial users of paper and ink products. Newspaper publishers pay the use tax on paper and ink consumed in production of their prod-

ucts, but other industrial users, such as printers of food wrappers, books and stationery, do not.

Owners of newspapers are not immune from "ordinary forms of taxation for the support of the government" on account of the first amendment guarantee of freedom of the press. *Grosjean v. American Press Co.*, 297 U.S. at 250; *cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) (first amendment does not immunize interstate newspaper publishers from requirements of Fair Labor Standards Act); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (first amendment does not immunize interstate newsgathering agency from requirements of NLRA). The question here, then, "is not whether the prospective ban burdens newspapers—it clearly may do so—but rather whether there is something special about the burden that renders it unconstitutional." *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938, 953 (D.C.Cir. 1977), *modified*, 439 U.S. 775 (1978).

An unconstitutional burden upon freedom of the press due to a tax measure was found in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). The State of Louisiana had imposed a license tax only upon those publications with circulations greater than 20,000 copies per week. Just thirteen newspapers in the state qualified to pay the tax. *Id.* at 240-41. The rate of the tax on these papers was 2% of the gross receipts from advertising.

The tax was struck down by the Supreme Court because it was a "deliberate and calculated device in the guise of a tax," enacted "with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 250-51. The history and setting of the gross receipts tax showed that the law had been passed for this purpose because the large newspapers were carrying

the banner of the political opposition to the governor of the state, Huey Long. *See Giragi v. Moore*, 49 Ariz. 74, 85-86, 64 P.2d 819, 823 (Lockwood, J., concurring), *appeal dismissed*, 301 U.S. 670 (1937).

The Supreme Court wrote:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.
>
> * * * The tax here involved is bad not because it takes money from the pockets of the [publisher]. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.

297 U.S. at 250.[7]

Following *Grosjean*, two courts invalidated taxes as unconstitutional burdens upon freedom of the press. *Mayor of Baltimore v. A. S. Abell Co.*, 218 Md. 273, 145 A.2d 111 (1958); *City of Tampa v. Tampa Times Co.*, 153 Fla. 709, 15 So.2d 612 (1943). The tax struck down in *City of Tampa* was a business license tax which increased dramatically with increased circulation: a $40 tax for newspapers and periodicals with a circulation under 10,000, increasing to $500 when

[7] In interpreting the *Grosjean* case, it is also noteworthy that gross receipts taxes on advertising were relatively new tax devices and were uncommon at the time; sales and use taxes are widespread today. Conlon, *Forward*, 9 Vand. L. Rev. 121 (1956) (forward to symposium on sales and use taxation).

circulation was between 10,000 and 30,000, and finally reaching $700 when circulation rose above 30,000. The court there concluded that *Grosjean* invalidated any license tax "based on volume of circulation and graduated by scale * * *." 153 Fla. at 711, 15 So.2d at 613.

The ordinances struck down in *Mayor of Baltimore* were municipal taxes imposed upon buyers of advertising in the Baltimore media in the amount of 4% of the gross sales price and upon sellers at 2%. The court found these taxes unconstitutional because they were not ordinary or general but were single in kind, falling not upon all modes of advertising but only upon advertising in newspapers, radio, and television. 218 Md. at 288-89, 145 A.2d at 119.

In the wake of *Grosjean*, *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937), sustained a privilege tax of 1% of the gross proceeds of sales or gross income of the business of publishing newspapers, periodicals, and other publications. The court there found that the tax was a revenue-raising measure, without hostility to the press, and part of a general sales tax. 49 Ariz. at 79, 64 P. 2d at 821.

A 3% tax upon advertising that included advertising in newspapers was upheld in *Lee Enterprises, Inc. v. Iowa State Tax Commission*, 162 N.W.2d 730 (Iowa 1968). The tax at issue was part of a general revenue-raising measure imposed upon all advertisers. *Id.* at 755. So, too, in *Territory of Alaska v. Journal Printing Co.*, 135 F. Supp. 169 (D. Alaska 1955), a business license tax was upheld that is similar to the tax at issue here: printing shops and publishers of newspapers were required to pay $25 plus .5% of gross receipts in excess of $20,000. *Accord, City of Corona v. Corona Daily Independent*, 115 Cal. App.2d 382, 252 P.2d 56 (1953) (nominal annual business license tax); *Donnelley Corp. v. City of*

Bellevue, 283 Ky. 152, 140 S.W.2d 1024 (1940) (occupational license tax); *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958) (general gross receipts tax).

The history and setting of section 297A.14, reviewed at the start of this opinion, reveal that it is not a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers distributed by publishers such as Star Tribune. It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota.[8] Unlike the type of tax found to be unconstitutional in *Grosjean*, sales and use taxes are now commonplace and readily accepted. *See, e.g.*, Northrup, *The Measure of Sales Taxes*, 9 Vand. L. Rev. 238 (1956); Note, *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 994 (1962) (hereinafter cited as *Developments*).[9] This type of taxation has no "long history of hostile misuse against the freedom of the press." *Grosjean*, 297 U.S. at 250.

Even the classification made by Minnesota's sales and use tax laws between publishers and nonpublishers does not render section 297A.14 unconstitutional under any standard of review, and in particular under the strict standard we apply here. The sales and use tax law is a revenue-raising measure.

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[8] Iowa imposes a similar tax on newsprint and ink. Iowa Code Ann. § 423.1, subd. 1 (West Supp. 1980).

[9] Indeed, what was once the major constitutional challenge to use taxation, violation of the commerce clause, is now resolved beyond doubt: "The compensating use tax is now so common that its validity has been virtually removed from the area of debate. If the burden imposed by a use tax is 'equal' to that imposed by a sales tax, the former is considered valid under the commerce clause." Note, *Economic Neutrality and the Compensating Use Tax*, 16 Stan. L. Rev. 1016, 1017 (1964) (footnote omitted).

This is perhaps the most compelling goal of a state government. Nonpublishers pay no use tax on consumption of paper and ink, but the goods they produce are subject to retail sales tax. Theoretically, the value of the paper and ink is reflected in the retail price that forms the basis of the sales tax. Newspapers and periodicals circulating at regular intervals not exceeding three months are not subject to retail sales tax. This may be a result of the difficulties and expense of collecting sales tax upon sales of such low-priced items.[10] Instead of the sales tax, these items are subject to use tax. There is no reason to believe that this legislative choice is insufficiently tailored to achieve the goal of raising revenue or that it burdens the first amendment in any way whatsoever. "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized." *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940).

But respondent contends that the purpose of the use tax on paper and ink cannot be said to be raising revenue because nonpublishers are exempt. By exempting industrial users from the use tax, the legislature was acting in accordance with its general scheme to exempt component parts from the use tax when the completed product is subject to sales tax. *Stan-*

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[10] Respondents suggest that newspapers and periodicals could not constitutionally be subjected to sales tax. This issue is not before us. But we note that books, for instance, are subject to retail sales taxes, even though they are clearly protected by the first amendment. We note also that several other states apply a sales tax to newspapers. Under Okla. Stat. Ann. tit. 68, § 1305(h) (West Cum. Supp. 1980-1981), carrier sales of newspapers and periodicals made directly to consumers are exempt, but other sales of these are taxed when the sale is over 75 cents. Newsstand sales of daily publications or those issued at regular intervals not exceeding three months are taxed in Virginia, while other sales of these are exempt. Va. Code § 58-441.6(k) (1974). West Virginia, too, exempts carrier sales but not other sales. W. Va. Code § 11-15-9(12) (Cum. Supp. 1981). Sales of newspapers were taxed in Wyoming, but are now exempt. Wyo. Stat. § 39-6-405(a) (xxi) (Cum. Supp. 1981).

dard Packaging Corp. v. Commissioner of Revenue, 288 N.W. 2d 234, 237-38 (Minn. 1979).

Respondent further claims that the differing treatment under the use tax cannot be explained by reference to the different treatment under the sales tax. Respondent contends that the sales tax is paid by the consumer and the use tax by the producer. This argument is also without merit. In all cases, producers of goods are free to assume the burden of any tax or pass some part of it on to consumers in the form of higher retail prices. *See Developments*, 75 Harv. L. Rev. at 994.

Additionally, respondent claims that section 297A.14 is unconstitutional simply because publishers have been chosen as a subject of direct taxation. Respondent claims that *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944), *Jones v. City of Opelika*, 319 U.S. 103 (1943), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), establish the proposition that no first amendment activity may be taxed directly. Those cases are inapposite here. *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 313, 151 N.E. 2d 170, 176, 175 N.Y.S.2d 1, 9, *appeal dismissed*, 358 U.S. 39 (1958). Each involved a general ordinance which was applied to require distributors or nonprofit sellers of religious material to pay a fee for a license to sell or distribute their material; none considered the question of the application of an ordinary use tax to revenue-producing, commercial activity throughout the state.

III.

We now consider whether section 297A.14 is unconstitutional because it exempts from use tax the first $100,000 of paper and ink products consumed annually. The practical effect of this exemption during 1974 and 1975 was to relieve from payment of use tax all but a dozen or so publishers.

Respondent claims that the exemption discourages newspapers from increasing their circulation, inducing them to stay beneath the $100,000 paper and ink consumption level to avoid paying use tax. A passage from *Grosjean v. American Press Co.* indicates that part of the reason the Louisiana tax was repugnant to the first amendment was its effect of discouraging circulation.

> [The tax] thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid * * * it well might result in destroying both advertising and circulation.

297 U.S. at 244-45.

We have held that section 297A.14 is not a "deliberate and calculated device" to restrict circulation. But respondent claims that section 297A.14 is invalid even if the restriction of circulation is unintended. *City of Tampa v. Tampa Times Co.*, 153 Fla. 709, 15 So.2d 612 (1943), and *Mayor of Baltimore v. A. S. Abell Co.*, 218 Md. 273, 145 A. 2d 111 (1958), discussed above, are relied upon by respondent. The license tax in *City of Tampa* was found unconstitutional because it was graduated by volume of circulation. 153 Fla. at 711, 15 So. 2d at 613. The tax in *Mayor of Baltimore* was found unconstitutional because it singled out the media even though the court detected no "ulterior, malevolent or untoward motive," 218 Md. at 280, 145 A. 2d at 114.

Section 297A.14, when viewed in the overall scheme of the state's sales and use taxes, does not single out newspapers. Nor is the exemption in section 297A.14 literally dependent upon circulation. Indeed, the figure in section 297A.14 is only

indirectly related to circulation, if at all. Consumption of paper and ink is tied to size and number of pages as well as quantity of copies. As noted at the beginning of this opinion, circulation figures correlate with payment of the use tax only roughly. In *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947), the court *upheld* a license fee imposed upon business activities including publishing. The tax consisted of a $10 fee on the first $3,000 of gross advertising receipts and $1.00 on each $1,000 above that. The *indirect* relationship to circulation that such dollar cutoffs implied was not sufficient to invalidate the tax. Accordingly, we need not invalidate a tax law which "may indirectly affect the economics of publication." *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938, 954 (D.C. Cir. 1977), *modified*, 439 U.S. 775 (1978).

Respondent also claims that section 297A.14 is flawed because it is "graduated," imposing a 0% rate on the first $100,000 of paper and ink consumed and a 4% rate thereafter. Such a "graduated" use tax, argues respondent, cannot be said to be even rationally related to the purpose of the tax.

Graduated gross sales taxes imposed upon sellers have been found to be unconstitutional. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935); *National Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360 (1939), *vacated and remanded*, 309 U.S. 551, *affirmed on remand*, 208 Minn. 607, 294 N.W. 230 (1940). In *Stewart Dry Goods*, the court found a gross sales tax, which taxed the first $400,000 of gross sales at one rate and increased the rate for each additional $100,000, up to $1,000,000, to be a denial of equal protection. It was suggested that the higher tax rates imposed upon higher volumes of gross sales were justified because the tax was a privilege tax and the value of the privilege increased when gross sales increased.

It was argued that a seller's net income and ability to pay increased as volume of sales increased. But the Court found that this alleged relationship between gross sales, ability to pay, and value of the privilege was nonexistent. Wrote the Court: "The law arbitrarily classifies these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed." 294 U.S. at 566.

National Tea involved the invalidation in Minnesota of a similar tax imposed only upon chain stores. Chain stores were classified by gross sales into eleven categories that imposed taxes at increasing rates. As in *Stewart Dry Goods*, no relationship was found between the privilege of selling and the higher tax extracted for greater volume of selling.

We do not find the reasoning of *Stewart Dry Goods* and *National Tea* persuasive in the context of this case. Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets. Rather, the use tax is constitutionally justified, as we said in Part II of this opinion, as a revenue-raising measure. The $100,000 exemption itself is justified if it is an integral part of the sales and use tax system.

It was suggested by the Commissioner of Revenue that the legislative choice to grant a use tax exemption for the first $100,000 of paper and ink consumed may be justified as a legislative policy to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered). Moreover, it is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order to do so,

the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state. "Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). We do not doubt that the $100,000 exemption, in the context of the sales and use tax, does not offend first amendment rights.

We reject respondent's contention that the legislature may not create a tax exemption which favors publishing enterprises unequally. Respondent argues that *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), establishes the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." In *Buckley v. Valeo*, the Supreme Court considered the constitutionality of the numerous provisions of the Federal Election Campaign Act of 1971. The statement cited by respondent was made in connection with the Court's discussion of the provision of the Act which limited to $1,000 the contribution individuals or groups could make "relative to a clearly identified candidate." The Court found this limitation a burden on speech and association not justified by the proffered governmental interests. The above statement was made when, after rejecting the primary interest, the Court also rejected the "ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections," *id.* at 48.

Neither the purpose nor the effect of section 297A.14 is to enhance the voice of one newspaper relative to another newspaper. The expenditure limitations found unconstitutional in *Buckley* were restrictions upon the total amount of money that could be spent by persons during a campaign. Such limi-

tations were "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount. The use tax may theoretically reduce the amount of money they may spend by reducing available capital. But all taxes do as much. There is nothing special about this form of taxation which elevates to a constitutional plane these theoretical effects on "quantity" or "diversity."

In conclusion, we find that section 297A.14 offends neither the first amendment nor the equal protection clause of the fourteenth amendment. Accordingly, we reverse the judgment of the district court.

Reversed.

APPENDIX B

Transcript of Oral Argument
before Minnesota Supreme Court,
May 4, 1981

NO. 51616
STATE OF MINNESOTA
IN SUPREME COURT

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Plaintiff-Respondent,

vs.

COMMISSIONER OF REVENUE,
Defendant-Appellant.

Transcript of proceedings had in oral arguments before the Minnesota Supreme Court in the above-entitled matter on the 4th day of May, 1981, held in the courtroom of the Minnesota Supreme Court, St. Paul, Minnesota.

APPEARANCES:

Faegre & Benson, 1300 Northwestern Bank Building, Minneapolis, Minnesota 55402 by Lawrence C. Brown, Esq., appeared representing the Respondent.

Paul R. Kempainen, Esq., Special Assistant Attorney General, Department of Revenue, Centennial Office Building, St. Paul, Minnesota 55145, appeared representing the Appellant.

Chief Justice Sheran: We have the case this morning of the Minneapolis Star and Tribune Company versus the Commissioner of Revenue. Appearing for the Appellant: Paul Kempainen. For the Respondent: Lawrence Brown. You may proceed.

Mr. Kempainen: Thank you, Your Honor. If it please the court and counsel, my name is Paul Kempainen. I'm representing the Commissioner of Revenue in this case and the State of Minnesota. I certainly hope that my oral argument fulfills the needs of the court in this case. This case was originally scheduled for decision on the briefs only and non-orally, and consequently, when I finished writing my brief, like a lot of lawyers, I just put the thing out of my head and I never thought of it again until I got the notice for oral argument, so I had to practically re-study the thing from scratch.

We are here this morning to discuss the constitutionality of a statutory provision duly enacted by the legislature of this State and contained in Minnesota's General Sales and Use Tax Law. Specifically, the issue is whether the third paragraph of Minnesota Statutes Section 297A.14 is constitutional under the equal protection clauses of our State and Federal Constitu-

tions and also whether it is constitutional under the freedom of press guarantees of our State and Federal Constitutions.

The law in question was originally enacted in 1971 in the form of a use tax at the rate of four percent, which expanded the already existing use tax to impose it upon all purchases of paper and ink products used in the printing of all tax-exempt publications. This original law is still the basis of the use tax which is at issue herein, and it was, to our knowledge, never challenged in any court on constitutional grounds, and it is not—the original law—is not challenged here. What is challenged is the fact that in 1973 the legislature amended that law to provide for one hundred thousand-dollar exclusion, from the bases of the tax, to the amount of one hundred thousand dollars in purchases made annually by tax-exempt publications of paper and ink, so that in effect what was originally a use tax imposed upon the paper and ink purchases of all tax-exempt publications in the State has now been reduced to a use tax which falls upon a considerably fewer number of the tax-exempt publications in this State because of the effect of this one hundred thousand-dollar exclusion.

The basic facts of this case are essentially undisputed. There was a motion—the decision below was made on a motion for summary judgment, and there are no material facts in issue. The facts consist first of all of the legislative history of the act and also of its application to the Star and Tribune and, to the extent that the facts indicate, generally upon tax-exempt publications in this state.

To get to the legislative history of this tax in focus, it's best to go back to 1967 when the sales and use tax was originally enacted in the state of Minnesota. In that year, if the court will recall, the legislature imposed a three percent sales and use tax upon the purchases of all tangible personal property

in this state with certain exemptions which are set forth specifically in 297A.25. Those exemptions are quite wide ranging, many of them are well known, including the exemptions upon food and clothing. Another exemption was upon certain publications but not all publications in the state of Minnesota.

The definition of what were tax-exempt publications rested upon, chiefly, the periodical nature of the publication. In other words, newspapers which came out daily were tax-exempt. Most magazines which came out at bi-weekly or monthly intervals were tax-exempt and so were trade journals and advertising circulars. However, books and other types of publications which did not come out on a periodic basis were not tax-exempt and they were taxed just like any other tangible personal property in the state.

Another point about that original exemption in 1967 was that the paper and ink products going into the publication of tax-exempt publications was expressly exempted from any sales or use tax. From 1967 to 1971, therefore, there was no use tax upon paper and ink products purchased by tax-exempt publications. In 1971 the legislature enacted, in its extra session, a very comprehensive and wide-ranging reform of the overall tax structure of this state. In substance, the effect of that tax reform law was to lower the overall property tax burden across-the-board in the State of Minnesota and to make up the difference in operating revenues for local governments and for school districts which originally had gotten their income from the property tax by a comprehensive program of state government aids to those local governments and to the educational school districts. Now, naturally this called for an increase in the statewide revenues, chiefly arising from the income tax and the sales tax, and in order to find those revenues the legislature had to take some fairly drastic tax increase steps.

In 1971, in its extra session law, one of those steps was to increase the rate of the sales tax from three to four percent, but if that law is reviewed by the court, the court will notice that even that was not considered by the legislature to be enough to raise the amount of revenue which it needed in order to reform the tax structure of this State.

Some tax exemptions also were looked at by the legislature. Among those tax exemptions were those in 297A.25, not alone the one on tax-exempt publications but also on others. But the one which is at issue here before this court is the one which exempted the purchase of paper and ink products by tax-exempt publications from any tax whatsoever. In effect, in 1971 the legislature said that a tax-exempt publication, when it bought paper and ink, had to pay the four percent tax rate upon its purchases of that paper and ink. Now, there was no hundred-thousand-dollar exclusion at that time. Instead, the tax was imposed upon all tax-exempt publications, whether they were large or small or whether they were rural or urban or otherwise. It was an across-the-board tax, and to our knowledge, from 1971 to 1973 that tax was paid by all tax-exempt publications without any challenge in the courts, and certainly there was no decision on constitutional grounds regarding that tax.

In 1973 the legislature amended the law in order to provide for a one hundred thousand dollar exclusion, which, as I have explained, is based upon the first one hundred thousand dollars in annual purchases made by tax-exempt publications. This is an across-the-board exclusion or exemption, it is given to all tax-exempt publications, whether they are large or small, rural or urban.

The application of this law was relatively simple. In effect, if you're a tax-exempt publication and you went out and

bought newsprint and ink, whether you were a magazine or a trade journal, advertising circular or newspapers, you had to pay the four percent use tax upon that purchase, and in effect, because it was a use tax, the most convenient way for most publishers to pay this tax was to pay it directly to the state by simply filing returns with the State. They did not have to pay it at the time of purchase to their suppliers.

In the newspaper industry this radically reduced the number of people who actually paid the use tax, and the facts of this case point out that in 1974, which is one of the years in issue, there were a total of 388 newspapers in the State of Minnesota. Of that number, eleven had purchases in excess of one hundred thousand dollars per year on paper and ink products and therefore paid the use tax. In 1975, which is the other year in issue, there were 374 newspapers in the State of Minnesota, and of that number thirteen newspapers had purchases in excess of a hundred thousand dollars per year and therefore paid some use tax.

I wish to point out to the court, because it was alluded to by the district court below in its opinion, that there were no facts adduced at the trial court level, to my knowledge, at any rate, regarding the impact of this tax upon any other types of tax-exempt publications. Those facts were solely with regard to the newspaper industry. I point this out because on page three of its opinion the lower court said, and I quote, "publications such as magazines, trade journals and advertising circulars are less likely to reach the hundred thousand-dollar threshold of taxable consumption." Now, there are no facts in the record in order to substantiate that. If it was taken on the basis of common sense or logic or judicial notice, we would suggest to the court that common sense or logic would indicate that there's quite a few large companies in this State that are in the business of putting out trade journals and

advertising circulars and could easily go over the one hundred thousand-dollar figure, but anyway I wish to point that out in my statement of facts because there are no facts regarding the application of this one hundred thousand-dollar exclusion to other tax-exempt publications besides newspapers.

The impact upon the Star and Tribune is brought out in the record, however. From 1971 to 1973 the Star and Tribune apparently paid the tax without any question. That was during the period before the one hundred thousand-dollar exclusion. From January 1, 1974, to May 31st, 1975, which was the first year and five months of the one hundred thousand-dollar exclusion's existence, the Star and Tribune paid a total of $874,-265.04 in use tax. At that time, after paying that tax, the Star and Tribune submitted the claim for refund to the state of Minnesota. Since the end of that period of time, up until January 31st, '78, the Star and Tribune paid almost another two million dollars in use taxes, and from January, '78, until at least the time of the district court opinion below which was rendered in May of 1980 the Star and Tribune continued to pay use tax. Now, this is in addition to the use taxes paid by the other newspapers in the State who have purchases over a hundred thousand dollars, and it's in addition to the use tax paid by other tax-exempt publications who have purchases over a hundred thousand dollars. So what we are talking about here is a substantial amount of revenue. We have no way of knowing at this time exactly how much, but we would estimate somewhere in the neighborhood of around ten million dollars is involved for past periods and not taking into account future revenues from this tax.

These then are the essential facts of this case regarding the law and its application, and procedurally the case began because on August 5th, 1975, the Star and Tribune filed a claim

for refund with the State of Minnesota Department of Revenue for the use taxes which it had paid. There was no challenge to the application of the law on that refund. There was, instead, —the sole basis for that refund was the constitutionality of the law itself, and because the Commissioner of Revenue is an administrative officer who does not feel that he has it within his powers to declare a law unconstitutional, he therefore denied that refund immediately and the next day he sent out notice of that denial to the Star and Tribune. That denial of that refund was appealed to the District Court by the Star and Tribune which it had a right to do under the procedures, it was appealed to the Hennepin County District Court on August 27th, 1975, an answer was interposed by the State of Minnesota through its Commissioner of Revenue, and eventually on January 25th, 1980, the Star and Tribune filed its motion for Summary Judgment. The hearing was held before the Honorable Judge Barbeau of the Hennepin County District Court on March 31, 1980. At that hearing on behalf of the State of Minnesota I made a cross-motion for summary judgment in favor of the State of Minnesota on this matter. On May 30th, 1980, the District Court issued its decision granting summary judgment to the Star and Tribune, holding that the law was unconstitutional upon three grounds:

Number one, because it was a denial of the equal protection guarantees under the any rational basis standard. Secondly, because it was a denial of equal protection under the strict scrutiny standard of review, and thirdly, because it was a denial of the freedom of press guarantees of the first amendment as applied to the states through the fourteenth amendment of the United States Constitution and also of the freedom of press guarantees in the Minnesota Constitution.

The State has brought this appeal because we think the District Court erred in its ruling. We feel that the law is consti-

tutional under the well settled standards of constitutional review, including but not limited to the fact that every presumption is made in favor of the constitutionality of the statute, the burden is upon the taxpayer in order to prove that it's unconstitutional beyond a reasonable doubt, and finally, the fact that the State Legislatures have a wide degree of discretion and flexibility under our constitutions in order to structure those flexible and appropriate schemes of taxation which are best suited to the needs of their States and their people.

Alternatively, if the statute is declared unconstitutional, on the first ground mentioned by the District Court, namely, equal protection, any rational basis, we feel that the decision should be limited to that ground alone and that the courts should follow the traditional and well settled rule of judicial restraint and base its decision upon statutory constitutionality upon the narrowest constitutional ground possible.

Chief Justice Sheran: Counsel, I think, before you leave, that you now are at the point which in my judgment at least accounts for our being here for oral argument, and it might help if I give you some impressions that I have at this moment which are probably no more than that.

Mr. Kempainen: I appreciate that, Your Honor.

Chief Justice Sheran: My impression is that the *Grosjean* case* has no application to our problem here because there there appeared to be a deliberate purposeful attempt to use the power of taxation to control the press. I don't see that as being the case here, and my impression is that the purpose of this is, fairly clearly enough, revenue raising as distinguished from expression controlling. However, the operative effect of the act is to favor the small publishers as against large ones in the sense that the level of exemption from the tax

* [*Grosjean v. American Press Co.*, 297 U.S. 233 (1936).]

benefits the weekly newspapers; for example, the daily newspapers with large circulations pay the tax; the others do not. And that brings us to the question then of how we test this kind of a taxing scheme on constitutional grounds, and if the *Cloverleaf** case applies, then to me the law is clearly constitutional, because any rational basis will insulate against an equal protection claim under the *Cloverleaf* doctrine.

Then the question is: "Is a more careful analysis of the law called for under the clear sc utiny test?" and my impression at the moment is that a taxing law which impacts on the operation of newspapers probably should be examined closely lest the unintended impact of it is to interfere in a significant way with the circulation of printed materials. If I'm right in that, and I suggest that only tentatively, then the question is will this law stand strict scrutiny, and in my judgment it will if there are some strong and compelling reasons why the legislature would accord what is in effect an advantage to the weekly newspapers as against the daily newspapers, and in part that could be because the weekly newspapers are less able to bear the burden of the tax or because there's difficulties of collection, by analogy, to other exemptions that occur in other areas which are not intended to help or hurt anybody, but merely facilitate the administration of the law.

So given those impressions, as I've stated to you, I think it will be clear to you that, in my mind at least, that except for the strict scrutiny problem in my view the Trial Court was clearly in error. However, this law in my judgment has to stand strict scrutiny, and the question is, "can it?"

Mr. Kempainen: Well, Your Honor, our primary position on the strict scrutiny issue is that strict scrutiny simply doesn't

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* [*State of Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).]

apply here—the test—and I would like to address that briefly before I get into whether or not the statute can withstand strict scrutiny. I would like to preface my remarks by saying I think the District Court was probably correct when it said in its opinion that few statutes can withstand the strict scrutiny standard of review. It's a very high standard. It requires not just any state interest; it requires a compelling state interest, and as this Court pointed out—I believe it was in the *Fifth Congressional District Independent Republican Party** case—under the strict scrutiny standard of review, not only must there be a compelling state interest, but the statute must be precisely drafted and created in order to meet that compelling state interest, and if it goes beyond that, even to a small degree, then it doesn't hold up under the strict scrutiny standard of review.

Having prefaced my remarks with my impressions upon that strict scrutiny standard, I would like to launch into why I think the strict scrutiny standard of review does not apply here. We feel that in order to apply the strict scrutiny standard of review to tax laws which impose upon first amendment—simply affect first amendment—protected activities, is to subject virtually every tax law, in fact virtually every law enacted by the States and the federal government to a strict scrutiny standard of review as they apply to first amendment-protected activities, whether it be parking regulations or labor laws or, for that matter, the property taxes and income taxes which the Star and Tribune admits are, in this case, are properly imposed upon it.

If the test for applying strict scrutiny is simply affecting the newspaper industry, then the property tax obviously

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* [*Minnesota Fifth Congressional District Independent-Republican Party v. State*, 295 N.W.2d 650 (Minn. 1980).]

affects the newspaper industry. Very indirectly it affects the circulation, because in order to have a large circulation, you have to have a large building. You have to have more real property. Your property taxes go up. And in effect that property tax therefore has an indirect effect upon the circulation of the newspaper.

Another example is the gasoline excise tax. In order to distribute the newspapers from the loading dock of the newspaper out to the news boys and distribute them around, you have to have trucks that buy gasoline, and those trucks which buy gasoline are just as much subject to the gasoline excise tax as any other citizen in the State.

It adds to the cost of producing the newspaper and circulating it, and yet there is no question, or I don't believe there would be, that the gasoline excise tax is a general tax which would hold up under constitutional review.

So what we have here, I believe, is the Star and Tribune taking the position that simply because the law affects a first amendment-protected activity, then it's subjected to strict scrutiny standard of review. But if the District Court is correct in saying that few laws can withstand that strict scrutiny standard of review, then we are in a very difficult position indeed, because very few laws will be able to handle that standard. It's a very high standard.

Justice Peterson: Supposing the gasoline excise tax was made applicable only to publication companies that used in excess of a certain number of gallons of gasoline?

Mr. Kempainen: Well, in that case, Your Honor, there would be no question that—you know, that would be aimed precisely at, you know, the publication industry, and one of our positions in this case is that this tax is not aimed precisely at the publication industry. It's a part of the general sales and use tax statutes, and it's simply an elimination of one of

the exemptions which had originally been granted under the general sales tax law. It's not a statute or a tax that stands upon its own. It's a part of the general overall scheme, and it's tied into the general sales tax rate. The legislature couldn't raise the rate of this tax on newsprint and ink unless it raised the overall general use tax and sales tax as well, so our contention in this case, Your Honor, is that it's not aimed precisely at publications. It's simply an elimination of an exemption which had previously been granted to them for whatever reasons the legislature sought to give it, and now those publications are subject to the same taxes as all other businesses in the State of Minnesota.

Justice Wahl: But, counsel, it is aimed precisely at the largest thirteen publishers?

Mr. Kempainen: By reason of the one hundred thousand-dollar exclusion, Your Honor, it's our point that it's not aimed at those publications, because those publications are just as much entitled to that exclusion as any other publications. It's a rule of equal application. And the equal protection standard of review requires only equal rules, not necessarily equal results. In fact I might point out that some of the large newspapers in this state, as the facts of this case show, in actual fact had more than just one one-hundred thousand-dollar exemption. The Star and Tribune itself gets two of them: one for its morning edition and one for its evening edition, and there's no question that that's correct, the commissioner has allowed that interpretation of the statute, so the Star and Tribune and all the other newspapers that end up paying some tax get the same benefits of this exclusion as any other taxpayers.

Justice Scott: Counsel, does the record contain any information about the background of this amendment in '73?

Mr. Kempainen: No, Your Honor, the best that I was able to find out—and this isn't in the record; this is my own personal statement to the court—the best that I was able to find out is that this provision was put into the 1973 tax law at a very late stage in the legislative session, and exactly when, I was not able to pinpoint, but the record does not give any indication as to the reasons why.

Justice Peterson: Counsel, do I understand correctly that the tax on ink and newsprint applies to all kinds of publications, trade journals and house organs, that sort of thing?

Mr. Kempainen: Yes, Your Honor. If they come within the definition of tax-exempt publications, which includes more than just newspapers. It includes advertising circulars, it includes trade journals, magazines. I believe the—I can't remember the exact limitation; I believe it's anything which is put out at a periodic basis, quarterly or less.

Justice Peterson: So that they are tax-exempt on their ink and newsprint unless they reach that hundred thousand-dollar threshold.

Mr. Kempainen: That's correct, Your Honor.

Justice Peterson: Judge Barbeau took judicial notice that there were no such, and used some force, and certainly at first blush that judicial notice is questionable in my mind. However, the fact is easily ascertainable. Are there any other publications in the State that actually in fact pay a tax by virtue of reaching that hundred thousand-dollar —?

Mr. Kempainen: I can only give you the substance of my conversation with certain examiners in the Minnesota Department of Revenue, and it's not a part of the record, Your Honor, but there are in fact large companies in the State who, for purposes of advertising circulars and so forth, do purchase large amounts of paper and ink and do exceed the one hundred thousand-dollar exemption.

Justice Peterson: Trade journals and advertising is commercial speech which is protectable under the first amendment. Are they not different in degree, however, from the role of a newspaper of general news in first amendment thinking?

Mr. Kempainen: If Your Honor's question is asking for a difference in the test on first amendment grounds between commercial speech and straight news speech, I'm afraid I haven't studied that and I wouldn't care to comment upon it authoritatively.

And with regard to the strict scrutiny standard of review, I would like to point out to the court, however, that we feel that the correct test of whether or not this standard of review comes into play is not simply when any law affects a first amendment protected activity. We are in agreement with the United States Supreme Court when it said in *Massachusetts Board of Retirement* v. *Murgia** that it only comes into play when it "impermissibly interferes with the actual exercise of a first amendment right or other fundamental right." Now, this is a slightly higher standard and we think it's the correct one to apply. In this case we don't feel that this tax impermissibly or otherwise interferes with the actual exercise of the newspaper's right to do business or any other tax-exempt publication's right to do business. I would like to point out that it is not a license tax, it is not a license fee. It is not imposed upon the privilege of doing business in the State of Minnesota. It is not imposed, it does not purport to take away or to grant the right of doing business in the State of Minnesota and it does not subject the publishing industry to any form of regulation whatsoever other than that which

* [*Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).]

is simply necessary for collecting the tax itself, namely the filing of the tax return. This is not like the types of taxes which have been struck down in the past when they apply to the newspaper industry, including the tax in the *Grosjean* v. *American Press Company* case. That was a license tax. It was in the statute expressly imposed for the privilege of doing business.

And the other cases which have been cited in the briefs, those taxes which have been struck down are almost invariably license taxes or fees imposed for the privilege of doing business.

If the Star and Tribune chose not to impose this tax, it wouldn't be forced out of business by the State of Minnesota. It would be simply subjected to the same collection procedures and civil penalties that any other sales tax or use taxpayer in this State would be subjected to. So therefore we simply do not think that the strict scrutiny standard of review comes into play in this case, and because it does not come into play, therefore we don't need to apply it to this statute. If it were applied, then I would have to submit that it would be—I would probably have to admit that it would be very difficult to uphold this particular statute under the strict scrutiny standard of review. It would not be impossible —

Justice Otis: What's the apparent reason for exempting newspapers from that?

Mr. Kempainen: Many reasons can come into effect, Your Honor. First of all, this is the United States of America, we have a long history in this country of respecting the freedom of the press, and just on that ground alone and the political unpopularity of imposing a sales tax upon the sale of an actual newspaper would be ground enough, we believe, for any State

Legislature to exempt that sales tax. There are other grounds which I have mentioned in my brief. There's administrative convenience. Perhaps the Legislature just sought to encourage the dissemination of news. But it's very interesting that not all first amendment protected activity is exempt from the sales tax. As I've mentioned previously, there are books, other than school books, which is a separate classification in and of itself again, that are subjected, including the law books which we all read, they're subjected to the sales tax, and those books are just as much subject to first amendment protection as newspapers.

Justice Otis: But the Legislature didn't seem inhibited when it came to income taxes and property taxes.

Mr. Kempainen: That's correct, Your Honor, perhaps because the sales tax is imposed more directly upon the actual consumer as he buys his newspaper. You would actually have to fork over the tax at the same time that he buys the newspaper, whereas the property tax and the income tax and any other form of taxation is more indirect, and eventually, to be perfectly honest, the reality is that the economic burden of taxes—whether it's imposed in the newspaper industry or any other sort of industry—is passed on to the ultimate consumer. I think that's a matter of common knowledge.

I thank you, Your Honor. In substance we simply feel that this law is constitutional, and the judgment of the District Court below should be reversed and summary judgment granted in favor of the State of Minnesota.

Mr. Brown: Mr. Chief Justice?

Chief Justice Sheran: Mr. Brown, lest the comments that I make might throw you off from a pattern that you had planned for your argument, I would want to make it clear that the views that I expressed are merely impressions and

mine only; they don't represent the views of the court or anybody other than myself. Nevertheless, for what it's worth, my impression is that there would be no possibility of sustaining the decision of the Trial Court in this matter unless the principle of strict scrutiny applies, and there there would be no possibility of upholding the decision of the Trial Court in this matter unless, examining the law strictly, analyzing its impact so far as the record permits us to analyze it in the real world, we were to be left with the impression that the Legislature, even though unintentionally, has done what *Grosjean* forbids and that is to put a burden on the printed media, which it, although intended as a tax, is going to interfere in some significant way with their operations, and I might add that I have difficulty seeing that this does. To me, this looks like purely a revenue measure, and that the exemption of a hundred thousand dollars and below has a rational, reasonable persuasive basis in fact in the real world, and on that grounds my impression is—this is purely personal and it's only an impression—is that the decision of the Trial Court should be reversed, so I mention that to you so you can take measure of where we're at here, at least in my mind.

Mr. Brown: Your Honor, I'll certainly try not to disregard those comments as I address the issues in this case.

Let me speak first about the record of this case. If the record is incomplete in any respect, that is my fault, because that record was created solely by counsel for Star and Tribune. There is no fact of record that was not submitted in support of our summary judgment motion. There was no fact submitted or suggested to the contrary by counsel for the State. All of the facts are undisputed.

The second point I want to make is there is no legislative history that would give us any insight, pro or con, to the

evolution of the taxing scheme from the sales tax in '67 to the use tax in '71 to the one hundred thousand dollar exemption in '73. Of record there is no factual basis upon which this Court can say that the Legislature was or was not acting in any discriminatory, as an intentional matter, way, going after the big newspapers. But the fact of the matter is that that's who it hits, and that's not a fact that can be contested on the record.

Justice Otis: I'm having trouble, Mr. Brown. Had the exemption been denied to large newspapers and granted to small ones, you would have a pretty good case, but I can't see how they were discriminated against when they all get the benefit of the hundred thousand dollar exemption.

Mr. Brown: Let me respond directly to that. We argued in part that this statute was unconstitutional under the Minnesota constitution's uniformity of taxation clause. When it was submitted to the lower court, Justice Wahl had recently written or was about to write the opinion in the *Minnesota Cable** case which held the statute there, a tax statute, unconstitutional under the state uniformity clause. It was a tax which fell on 112 cable systems but six were exempt. Here, you have a tax that literally falls on 350 to 400 newspapers, only three percent of which pay the tax. I happen to be —

Justice Todd: But aren't all exempt?

Mr. Brown: Your Honor, they are —

Justice Todd: If you're distinguishing from *Cable*? I mean I don't see where *Cable* falls in, because in *Cable* there wasn't a uniform application. That was the problem with *Cable*.

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* [*Minnesota Cable Communications Association, Inc. v. Minnesota Cable Communications Board*, 288 N.W.2d 721 (Minn. 1980).]

Mr. Brown: Your Honor is quite right. In the *Cable* case six were totally exempted because the moneys they were paying went elsewhere. I don't wish to give you a corny example, but the fact of the matter is, from our viewpoint, the way this exemption works in the real world is it's like a blade six feet over your head, and you walk underneath the blade, and if your hands are beneath six feet off the ground, you don't get cut. But if you're up above six feet, you get cut by the tax because that's where the impact fits in. Now, that is one of the two discriminations.

Justice Todd: Is that any different, counsel, from the homestead exemption?

Mr. Brown: Yes, it is, Your Honor.

Justice Todd: If my house is cheap enough, I get by pretty good. If I got a big, fancy house, I don't get by and my hands stick up above the blade.

Mr. Brown: Your Honor, the social policy, I believe, that underlies the homestead exemption, namely the encouragement of citizens of this State to own their own home, is not present in this case in any way, and I believe that is grounds legitimately for distinguishing that exemption which I wouldn't be arguing against.

The next point I would like to make, Your Honors, is that this is a tax on the only two physical components of a newspaper. A newspaper consists of newspaper and ink, and the record reflects those costs in the percentages that wind up in the published newspaper that you may read every day. The State has suggested —

Justice Todd: You're not disputing, counsel, that you have to pay a tax when you buy a press or you buy the new computerized —

Mr. Brown: No, Your Honor.

Justice Todd: — Things that each reporter now has that makes up the paper and this is the mechanism for making it visible, but the makeup of the paper is done now with a nice little computer screen and lithographers no longer have a job and you pay tax on that, and that's more to do with the paper than the print and ink.

Mr. Brown: Your Honor, we tried to make it clear through the record that the Star and Tribune is a good dues-paying tax-paying citizen of the State of Minnesota and it pays all generally applicable taxes — that is, generally applicable to businesses. It pays an income tax. It pays property taxes and we don't dispute that. The vice of this tax, from our viewpoint, is that it is a direct tax on the two components of the newspaper, and as such, it becomes a direct tax on the act of communicating news and information through the vehicle of the newspaper.

I happen to disagree with the Chief Justice's initial impression, and I would like to simply mention that in our view, Your Honor, under the first amendment freedom of the press point, it isn't the act of a Legislature intending to discriminate against the press that results in freedom of the press being infringed. The intentions of the Legislature, I believe, are immaterial. In *Grosjean*, that was present. It was a very unusual case in its factual setting coming as it did out of a highly political situation in Louisiana. However, as we cite on page 49 of our Trial Court brief, in the *City of Tampa** case, the Supreme Court of Florida made the very point, contrary to Your Honor's impression, that the arbitrariness or the unreasonableness of the tax or the motivations underlying its enactment are immaterial. What is material, I suggest, Your Honor, is what does the tax do? What does it impact? And if

* [*City of Tampa v. Tampa Times*, 15 So.2d 612 (Fla. 1943).]

it impacts a first amendment right—here, the exercise of the freedom of the press—then two things follow: first of all, I do believe it follows that you do have a first amendment issue confronting the Court that ought to be resolved as the Trial Court did. But secondly, I believe in this case that under the equal protection challenge, strict scrutiny is the appropriate test. This Court last fall came out with two tax opinions, the last of which was Justice Simonett's opinion in the *Guilliams** case, and in that case, which was argued the morning I was here, Mr. Kempainen made the point that is picked up in the opinion that in *Guilliams* you did not have a fundamental constitutional right involved. You were dealing strictly with tax classifications in an equal protection environment where the strict scrutiny standard wasn't present, and as the opinion reflects, this Court specifically disclaimed the presence of a fundamental constitutional right as part of its grounds for upholding the constitutionality of that statute, and freedom of the press was one of them that you mentioned.

Justice Scott: Counsel, wouldn't that argument apply to the '71 law, too?

Mr. Brown: Your Honor, I think this entire use tax could have been challenged before it was in this case. It is my view that this use tax imposed without the exclusion violates freedom of the press. It also violates in my view the equal protection standards, because what the Legislature did—

Justice Scott: But getting back to the fundamental constitutional right, how did the '71 amendment interfere with the right to do business?

Mr. Brown: The 1971 amendment which imposed the use tax on the consumption of paper and ink, used in making a

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* [*Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138 (Minn. 1980).]

newspaper, which levied first a three and then later a four percent tax on paper and ink, was the same direct tax, Justice Scott, that we have here in this case, the only difference being that in 1973 the Legislature added the one hundred thousand-dollar exclusion.

Justice Scott: So you're saying they reduced the tax?

Mr. Brown: The net effect is to reduce the tax, and it can't be justified on a revenue-raising measure.

Justice Todd: Counsel, while we're on it, can I ask a question? If we deal with the '71 amendment, then we don't have an equal protection argument.

Mr. Brown: No, Your Honor, that's not correct. There are two levels of classification that we have attacked, and the trial court agreed with both of our arguments. The first classification that we attacked is the distinction between industrial users of paper and ink. They aren't subjected to any use tax at all. They have a sales tax—

Justice Todd: Wait a minute. Now you're wandering into another field because those are decisions that end up because they ultimately are charged that tax. It's part of the cost of production. Now, to argue that they don't pay the tax is to ignore the realities. I don't — I think you're being a little — because that's in the *Mankato Press** case, it's in all those old tax cases that say when you buy things and eventually sell the final product and charge a sales tax on the final product, all the cost components get taxed on down the line.

What I'm interested in is in your first amendment you want to superimpose upon this thing, and I just—I guess we just disagree with the equal protection, but assume it's not there. If you're saying the first amendment superimposes something on this, what different argument would you make if we were

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* [*Midwestern Press Inc. v. Commissioner of Taxation*, 295 Minn. 530, 203 N.W.2d 344 (1972).]

here considering the income tax, property tax, any tax? What different argument would you make absent equal protection if you're going to superimpose first amendment as being the real infringement here?

Mr. Brown: Your Honor, I'm going to try to be responsive, and I hope, if I fail, it isn't read as an intention to avoid. If we were here talking about an income tax and making a first amendment right argument, in all honesty I wouldn't be here because a graduated income tax, as you well know, is after deductions for costs and expenses. It is based on net taxable income. The tax here is a tax that is paid by the user of the paper and ink products. It is a direct tax without regard to ability to pay. The Star and Tribune could be awash in red ink —

Justice Todd: Well, let's talk about property tax then.

Mr. Brown: All right.

Justice Todd: That's not based on ability to pay.

Mr. Brown: Property tax is based rather on the assumption of a value and an assumption drawn from the assumption of value that if you own an asset that is valuable, you have an ability to pay. That is not the basis for this tax. The sales tax is not paid by the seller. The sales tax is added to the price the seller charges the public. It is collected and then refunded. This tax, the use tax, its very concept: it is a tax that is paid by the user and consumer of the articles taxed, and it is that point, I respectfully submit, that establishes our argument in part that this is a direct tax on the articles that make up the newspaper, and as a consequence, you are confronted with a legitimate first amendment concern.

Justice Sheran had asked what justifications could there be for this taxing scheme under the strict scrutiny standard?

I suggest to you, Your Honors, there is none of record. There is no fact that can be pointed to of record that would justify either the tax or the one hundred thousand-dollar exclusion. It isn't a revenue-raising measure to exclude up to four thousand dollars a year of use tax, and yet the impact of that on publications alone is in excess of a million dollars of lost revenues as a result of the hundred thousand-dollar exclusion, because in the years in question — 1974 and '75 —

(Whereupon, the cassette tape, from which this transcription was made, was switched from side 1 to side 2, losing some verbalization in the switching process, and the oral argument resumed with Mr. Lawrence Brown responding, as follows:)

Mr. Brown: The hundred thousand-dollar exclusion paid no use tax at all on paper and ink.

Justice Otis: Well, counsel, sorry to interrupt, but the realities are, it seems to me, or I'll ask you, that publishers are not going to restrict their circulation because they get into a non-exempt bracket. What real impact is there on the Minneapolis papers by having to pay a tax that some others don't? The scope of their news coverage, the scope of their circulation, the depth of their reporting or any other aspect of their business in reality?

Mr. Brown: Mr. Justice Otis, I would suggest that the answer to that is that it's analogous to having a little bit of cancer. A little bit of cancer won't kill you. But what's the impact of four percent? If that's legitimate, how about five or ten or twenty? That's the parade of horribles argument that the first amendment was intended to nip in the bud. This Court said, in the *Fifth District* case, that any interference—it didn't say the magnitude of the interference; it said "any interference" with a fundamental right, first amendment, is impermissible—that's an unqualified word—if it is

not necessary to the accomplishing of a compelling state interest. Now, I have challenged the State in the court below and again here before Your Honors. I see no interest of the State at all, much less a compelling one, either to tax, without exclusion, the paper and ink products that are consumed in the publication of a newspaper, but going beyond that, if I lose on that one, what of record interest, if any, is there in the State in granting an exclusion that effectively, in the real world, exempts all but three percent of the potential taxpayers of the tax? I suggest there is none.

Justice Peterson: Let me just—this may turn out to be a question or it may be only a rumination, but it tends to isolate the first amendment issue from the equal protection issue in this case, although I recognize that the two may very much become intertwined. The '71 tax taxed all newspapers, and there was no claim at that point of a first amendment violation, which isn't dispositive, but significant in terms of the history of the news media being quick to assert first amendment in the book print and electronic media against government regulation, government tax and that sort of thing.

You have the situation here where, in terms of competitive voices for the eye and the ear, the large publishers are not in that way being really competitively disadvantaged for their right to speak or to print. To the extent, for example, that, in the noncompetitive situation in Minneapolis, the large papers are these respondents. If there's any competition, it's with the St. Paul papers, and they, too, are paying it, and it isn't that the news isn't being heard in the land because to the extent that it favors—now we get to the equal protection—to the extent that it favors the small, it is making possible more voices to be heard and views to be printed and seen, and that result is certainly not violative of the first amendment,

but serves what we have conceived its historic purposes, of many voices being heard; that it is really consistent with first amendment to ease the burden of the small so that they may exist along with the large.

All right. That was too long.

Mr. Brown: Well, Your Honor, within the rumination there were some questions and let me see if I can respond to a couple of them. First of all, I know of no constitutional decision in this country that holds that the act of a Legislature to encourage the exercise of a fundamental constitutional right is itself unconstitutional. These issues, as you can appreciate, only come up when there is at least a perceived infringement or repression of the exercise of freedom of the press, for example.

In the *Grosjean* case, which Chief Justice Sheran suggests is not applicable, that case was resolved in the District Court on equal protection grounds. It was resolved by the U. S. Supreme Court on first amendment freedom of the press grounds, and the crux of the holding is that the taxing statute there was held to have a direct tendency to restrict circulation. Now, in Your Honor's questions and ruminations you suggest an evening up of the battle in the competition in the news area. My response to Your Honor's suggestion there is simply this: that is not, in my view, the way freedom of the press is viewed by the United States Supreme Court. It is not the burden of a party whose first amendment rights have been stepped on, so to speak.

Justice Peterson: You don't increase another man's rights by diminishing yours.

Mr. Brown: Correct, Your Honor, and that's my point. And here we believe, and I really don't know where I am in my time, I've lost track, but we could go on and discuss these

interesting and important issues. I guess if I'm near the end of my time I would like to close, subject to any questions you have, with this point: *Grosjean* was decided in 1936. It is still the law of this land and it is good law, because it protects even the inadvertent acts of legislative bodies where their acts impose restraints or restrictions on the exercise of freedom of the press. That is the focus of the first amendment argument. The focus is not whether people can compete better or worse, whether people should have a better right to publish newspapers or a less expensive ability in the rural areas. If you find, as I think you must, that this tax is a direct tax on the exercise of freedom of the press, which it is, then at the least you must address the equal protection argument under the strict scrutiny standard, not only to be in accord with the United States Supreme Court's pronouncements but your own as late as last fall. We are here also to try to have this statute declared unconstitutional on the pure equal protection argument that we have made, and Mr. Justice Todd, I think in the context of this case, the *Cable* case is applicable. The standards of the *Cable* case are applicable, and the result as to the one hundred thousand-dollar exclusion here should be the same result reached in the *Cable* case; the whole statute should be held unconstitutional.

Justice Scott: The only practical problem, counsel, with that, would be that then the legislative answer would be to just remove the hundred thousand and you would pay more taxes.

Mr. Brown: Your Honor, if that is the prospective way the legislature wishes to treat the problem, that's a day for another lawsuit because you still would have the first amendment issue present. That can't obtain here because there have been hundreds of potential taxpayers who have never paid

the tax and the same severance issue was raised in the *Cable* case, and as this Court's opinion reflects, it was not a sufficient remedy to simply excise the offending portion because it was so integral to the whole statute itself.

Justice Peterson: It would take another minute, I suppose, if I ask you this question. You're talking in terms of its effect, direct or indirect. That being so, why should it be different whether the tax is direct or indirect?

Mr. Brown: Your Honor, I don't think it should, but the cases seem to say — they use language about a direct impact or a restriction upon a fundamental right. Here, it's suggested in the State's argument that the four percent sales tax could have been constitutionally imposed on the act of communication when the newspaper is transferred from the publisher to the reader. That is in their brief and they argue that that would have been constitutional. We don't believe that at all. But that is used to support the argument that what is done here indirectly, through the use tax on the two components of the newspaper, is constitutional because it is lesser than the greater. Our view is that — and we set out in the record — it was mooted by the argument the State made — we set out to create a factual record, because of the case law as we perceived it, to show a direct relationship between the tax on the two components irrespective of ability to pay, irrespective of income, having an impact on the communicative act of the transfer of the newspaper from the publisher to the reader. Then the State came along and said 'well, we could have imposed a sales tax on it anyway,' so really that's in our proof portion of the case, we got superseded a little bit by the subsequent argument that was made, but the cases seem to turn — maybe it's semantical — but they seem to always turn on whether or not there's been a direct infringe-

ment on a constitutionally protected right and that's why we argued it that way.

Chief Justice Sheran: Your case, in so far as it's based on federal constitutional grounds, entitles you to seek review in the United States Supreme Court should the decision of this Court with respect to the matter be adverse and unsatisfactory, does it not?

Mr. Brown: I believe it does, Your Honor.

Chief Justice Sheran: There's nothing in the posture of this case that makes this necessarily the final arbiter of where we're at on this issue.

Mr. Brown: It does not, Your Honor, although our client's interests, as distinguished from my own professional desires, are somewhat at conflict at that point. Our client would like this Court to be the final arbiter and hold the statute unconstitutional on the grounds that we have suggested. I would say, Your Honor, that this Court has held, as recently as a year and a half ago, that the constitutional standards of our Constitution may be higher than those of the Federal Constitution in these fundamental rights cases, and therefore this Court is in a position to give greater protection to citizens of this State than would the United States Supreme Court, not to suggest they would be less, but your hands aren't tied simply because we have argued alternatively State and then Federal Constitutional grounds.

Chief Justice Sheran: Thank you, counsel. I think we have the issues in this case pretty well in mind, unless there's some —we'll move on then to the next case.

(Whereupon, the hearing was concluded.)

Certificate of Court Reporter

I, Warren L. Jones, registered professional court reporter, certify that I recorded verbatim by stenotype from a taped recording the proceedings of the preceding 39 pages.

I further certify that the foregoing verbatim transcript constitutes a full, accurate and complete record of said proceedings.

Given under my hand this 17th day of February, 1982, at Minneapolis, Minnesota.

/s/ Warren L. Jones, Rpr

APPENDIX C

Order and Memorandum of
Hennepin County District Court
Judge Donald T. Barbeau,
Dated May 30, 1980

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

File No. 718018

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Plaintiff,

vs.

COMMISSIONER OF REVENUE,
Defendant.

ORDER

The above-entitled matter came on for hearing before the undersigned, one of the judges of the above-named Court, on

the 31st day of March, 1980, upon the motion of plaintiff for an order granting summary judgment.

Paul R. Kempainen, Esq., Special Assistant Attorney General, appeared for and on behalf of the Defendant Commissioner of Revenue, who was also represented by C. H. Luther, Deputy Attorney General. Lawrence C. Brown, John K. Steffen and John Borger appeared for and on behalf of Plaintiff Minneapolis Star and Tribune Company.

The Court, having heard the arguments of counsel and being fully advised in the premises, upon all the files, records and proceedings in this action, has determined that there are no genuine issues as to any material facts and that plaintiff is entitled to the relief prayed for in its complaint as a matter of law. Accordingly,

IT IS HEREBY ORDERED:

That the motion of plaintiff for summary judgment be and the same hereby is granted in its entirety; that Minn. Stat. §297A.14, to the extent that it imposes a tax upon consumption of paper and ink products used to produce publications, be and the same hereby is declared unconstitutional as a denial of equal protection of the laws in violation of Article I, Section 2 and Article X, Section 1 of the Minnesota Constitution and in violation of the Fourteenth Amendment to the Constitution of the United States and as an abridgement of freedom of the press in violation of Article I, Section 3 of the Minnesota Constitution and in violation of the First and Fourteenth Amendments to the Constitution of the United States; and that defendant be and hereby is ordered to return to plaintiff the amount of $874,265.04 with interest thereon as provided by law. Plaintiff is allowed its costs.

By the Court:

DONALD T. BARBEAU

Judge of District Court

Dated: May 30, 1980.

Stay Entry of Judgment 30 days.

MEMORANDUM

STATEMENT OF THE CASE

This case is a tax matter involving the constitutionality of that part of Minnesota's general sales and use tax law, specifically, the third paragraph of Minnesota Statute 297A.14 which imposes a four percent use tax upon the cost of purchasing paper and ink products used in producing any publication which is exempt from the sales and use tax. The same statute also provides that the first $100,000 in such purchases each year shall not be taxed.

The State contends that the plaintiff, the Minneapolis Star and Tribune Company, is subject to this use tax because it purchases paper and ink products for use in printing its newspapers.

During certain taxable periods in question the Star Tribune paid the use taxes allegedly due under Minnesota Statute 297A.14 and subsequently filed a refund claim with the Minnesota Department of Revenue. The basis for said refund claim had to do with the alleged unconstitutionality of the statute itself. The Department of Revenue immediately denied the Star Tribune's application.

The Star Tribune thereupon commenced this action on August 27, 1975, as an appeal from the Commissioner's denial. The defendant, Commissioner of Revenue, duly interposed his Answer to plaintiff's Summons and Complaint on September 2, 1975.

The matter came before the Court for summary judgment sought by both parties which was heard by this Court in oral argument on March 31, 1980.

In seeking summary judgment the Star Tribune presents three constitutional challenges to the 4% use tax on paper and ink products consumed in the production of publications:

First, it discriminates without any rational basis against publishers of large-circulation Minnesota newspapers, and accordingly denies Star Tribune equal protection of the laws in violations of the Minnesota and United States Constitutions.

Second, it discriminates against such publishers' constitutionally protected right of freedom of the press in a manner not necessary to accomplish any compelling state interest, and as such, it denies Star Tribune equal protection of the laws in violation of the Minnesota and United States Constitutions.

Third, it abridges Star Tribune's constitutionally protected right of freedom of the press in violation of the Minnesota and United States Constitutions.

During the time period in question, viz., January 1, 1974, through May 31, 1975, Star Tribune paid an aggregate of $874,265.04 in use taxes on its purchases of paper and ink products.

As the result of actions of the Minnesota Legislature in 1967, 1971 and 1973, the use tax on the consumption of paper and ink products was variously imposed as follows:

1. From 1967-1971, there was no use tax imposed on the consumption of paper and ink products to produce other products; other industrial users and producers of publications received equal treatment—no use tax.

2. From November 1, 1971—December 31, 1973, producers of publications who consumed paper and ink products in producing publications were treated differently from other industrial users; only producers of publications were subject to the use tax.

3. Commencing January 1, 1974, the disparate use tax treatment of producers of publications and other industrial

users continued. In addition, however, producers of publications as a class now received disparate use tax treatment among the class members depending upon the amount of paper and ink products they consumed in producing their publications: those who consumed less than $100,000 of paper and ink products annually paid no use tax, whereas those whose consumption of paper and ink products exceeded $100,000 paid the use tax on the excess above $100,000.

At the oral arguments and in the briefs it is admitted as an undisputed fact between the parties that the use tax imposed on paper and ink products affected only approximately 3% of all Minnesota newspaper publishers. Because publications such as magazines, trade journals and advertising circulars are less likely to reach the $100,000 threshold of taxable consumption, the percentage of all Minnesota "publications" affected by the challenged use tax probably is even less than the 3% figure. In other words, it is admitted by all parties that the "target" which is hit by this use tax is a few publishers of large-circulation Minnesota newspapers.

DISCUSSION

The statutory discrimination takes two forms: first, other industrial users of paper and ink products are not subject to the use tax, whereas publishers of large-circulation Minnesota newspapers are subject to the use tax; second, within the classification of "publications," only the large-circulation Minnesota newspapers which consume in excess of $100,000 of paper and ink products annually are subject to the use tax, while their smaller fellow publishers escape the imposition of the use tax because their annual consumption of paper and ink products does not exceed $100,000. These statutory discriminations violate Star Tribune's equal protection rights guaranteed by Article I, Section 2 and Article X, Section 1 of

the Minnesota Constitution, and the Fourteenth Amendment to the Constitution of the United States.

In addition to the unconstitutional statutory discriminations, the use tax on paper and ink products consumed in producing publications is an unconstitutional abridgment of Star Tribune's right to freedom of the press guaranteed by Article I, Section 3 of the Minnesota Constitution, and the First and Fourteenth Amendments to the Constitution of the United States.

A. The Challenged Use Tax is an Unconstitutional Denial of Equal Protection.

Equal-protection review under the "no rational basis" standard requires that, for purposes of economic regulation, statutory classifications must be "rationally related to a legitimate state interest." *Clover Leaf Creamery Co. v. State of Minnesota*, —— N.W. 2d ——, (Minn. Sept. 7, 1979). Under the equal protection guarantees of the Minnesota Constitution, the analysis:

> . . . includes three primary elements: (1) the distinctions which separate those included within the classification and those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.
>
> (*Miller Brewing Co. v. State of Minnesota*, 284 N.W. 2d 353, 356 (Minn. 1979).)

Another fundamental principle of equal protection law is that "one alone may constitute a class as well as a thousand, but the fewer there are in a class, the more closely the courts will scrutinize the act to see if its classification constitutes an evasion of the constitution." *Schwartz v. Talmo*, 295 Minn. 356, 362-63, 205 N.W. 2d 318, 322-23 (1973); *Loew v. Hagerle Bros.*, 226 Minn. 485, 489, 33 N.W. 2d 598, 601 (1948). Here, the challenged use tax falls upon approximately a dozen Minnesota newspaper publishers out of all Minnesota producers of publications and thus invites close scrutiny.

The classifications used by the Legislature are neither genuine nor substantial. The challenged use tax, which distinguishes between paper and ink products consumed in producing a publication and those same products consumed in producing, for example, a printed milk carton, makes a distinction which lacks a rational basis.

The Legislature's second classification between publications, those consuming more and those consuming less than $100,000 of paper and ink products annually, is even less genuine and substantial. There are no qualitative differences between publications which consume large or small quantities of paper and ink products; all convey information on a regular basis to the general public.

In *American Press Co. v. Grosjean*, 10 F. Supp. 161, the Court invalidated a tax on advertising which applied only to publications having a circulation of more than 20,000 copies per week. The Court held that such a "big paper only" tax denied equal protection of the laws.

A statutory classification grounded upon a necessarily arbitrary drawing of a line exclusively based upon size such as the $100,000 exemption features of the challenged use tax is presumptively suspect on equal protection grounds just on the basis of common sense.

As said in *Hall Hardware Co. v. Gage,* 197 Minn. 691, 268 N.W. 202, "We cannot classify big and little taxpayers. Before the law each must stand upon his own rights and must be accorded the same treatment within the law."

Article X, Section 1 of the Minnesota Constitution expressly mandates that taxes "shall be uniform upon the same class of subjects." It logically follows that a graduated tax on gross expenses, such as the use tax on paper and ink products consumed by publications, is unconstitutional because its focus on gross expenses bears no rational relationship to ability to pay. The Ohio Supreme Court invalidated a similar tax scheme such as this in *Kroger Co. v. Schneider,* (Ohio, 1967) 223 N.E. 2d 606, as did Florida in the case of *Volusia County Kennel Club v. Haggard,* (Florida, 1973) So. 2d 884. To the same effect, see the decision of the Pennsylvania Supreme Court in *Blauner's, Inc. v. City of Philadelphia, Pa.,* 198 A. 889.

In summary, the Court finds that monetary subclassifications simply have no rational justification in the area of sales and use taxes. It singles out for discriminatory tax treatment, not even an entire industry to be taxed equally, but only a small segment of a single industry—newspaper publishers—to be taxed discriminatorily. Such arbitrary classification constitutes a denial of equal protection.

Any State purpose of burdening the publishing industry in general is obviously illegitimate and runs afoul of state and federal guarantees of freedom of the press which prohibits special taxes on the press.

Any State purpose of burdening one segment of the press—i.e., large-circulation Minnesota newspapers, as a result of the $100,000 exemption—also is illegitimate. State and Federal guarantees of free press not only prevent the State from burdening the entire press with a tax not borne by other busi-

nesses, but also bar the State from singling out particular segments of the press industry for special favors or penalties.

For example, the Illinois Supreme Court has held that a state tax provision may not discriminate between newspapers and magazines for purposes of sales and use tax exemptions for purchases of "such tangible personal property as newsprint and ink for the primary purpose of conveying news" and for the sales of news publications themselves. *Time, Inc. v. Hulman*, 201 N.E.2d 374 (Ill. 1964) (relying in part on equal protection principles).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the United States Supreme Court struck down provisions of the Federal Election Campaign Act which imposed $1,000 limits on independent expenditures to advocate the election or defeat of clearly identified candidates for federal office. The Supreme Court rejected arguments that the government had a legitimate interest in equalizing the relative ability of individuals and groups to influence the outcome of elections. The Supreme Court stated:

> (T)he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' ". . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion . . .
>
> (424 U.S. at 48-49 (citations omitted).)

Clearly, *Buckley v. Valeo* would prohibit the State from limiting each publication's annual consumption of paper and ink products to $100,000. By choosing instead simply to tax all consumption of such products in excess of that amount, the State has taken a step which may be less drastic but is no less constitutionally invalid.

A legislative scheme which taxes the instruments of communication of some publications, but exempts others, clearly places a discriminatory burden on freedom of the press. The challenged use tax penalizes the circulation of information and ideas by large publications and creates incentives to reduce the circulation and size of publications. The fact of the tax burden, and not its amount, is the objectionable factor.

When challenged as a denial of equal protection, any governmental classification which affects First Amendment rights must withstand the "strict scrutiny" standard, which demands that the classification must be *necessary* to the *accomplishment* of a *compelling state interest. Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 n.3 (1976); *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 99 (1972); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 704 (M.D. Fla. 1978); *Quad-City Community News Service, Inc. v. Jebens*, 334 F. Supp. 8, 15 (S.D. Ia. 1971).

Classifications properly subjected to the strict scrutiny standard must be "precisely tailored to serve a compelling governmental interest." *Regents of University of California v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J., concurring). States may not choose means that unnecessarily restrict

constitutionally protected liberty; rather, states must adopt the least drastic means to achieve their ends. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, ——, 59 L. Ed. 2d 230, 242 (1979). In "order to justify the use of a suspect classification, a State must show that its purpose of interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose of the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721-22 (1973); *See also Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

Thus, "relevant" under the "no rational basis" standard of review becomes "necessary" under the strict scrutiny standard, while "legitimate state interest" becomes "compelling governmental interest." In addition, in a strict scrutiny case, the State bears the burden of proof on the issues of legitimacy and substantiality of its interests and of the necessity of the challenged classification to support that interest. *Regents of University of California v. Bakke*, 438 U.S. 265, 306-18 (1978) (Powell, J.); *In re Griffiths*, 413 U.S. 717, 721-22 (1973). That burden is a heavy one.

There can be no question that the production of a publication is a clear and unquestionable exercise of the right of freedom of expression. That is a fundamental constitutional right protected by the Minnesota and United States Constitutions. Star Tribune's equal protection challenge to the use tax on paper and ink products consumed in producing a publication thus has an alternative ground. This Court must determine whether or not the Legislature's classifications incorporated in the challenged use tax will withstand "strict scrutiny" —are those classifications necessary to the accomplishment of a compelling State interest?

As discussed in Star Tribune's initial equal protection challenge to the use tax, among all industrial users of paper and ink products, producers of publications included, only those which consume those products in the production of newspapers and other publications presenting information to the general public pay the use tax. Among all publications, only those which annually consume more than $100,000 of paper and ink products pay the use tax. To obtain equal use tax treatment enjoyed by small-circulation publications and industrial users of paper and ink products, Star Tribune would have to reduce the number of pages in its publications, reduce the number of copies of its publications, reduce the frequency of its publications, or use the paper and ink products it consumes to produce something else. Each of those alternatives would significantly reduce the amount of information Star Tribune presents to the general public. Thus, each of those alternatives abridges Star Tribune's constitutionally protected right of freedom of expression.

When a classification is subject to strict scrutiny, proffered explanations of legislative purposes based on speculation and unsupported by evidence in the legislative record will not suffice. The reviewing court—this Court—should not accept generalized, after-the-fact rationalizations for legislations. *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 447-55 (1972).

Neither the legislative taxing scheme nor the legislative history support a conclusion that the classifications of the use tax on the consumption of paper and ink products by publications were enacted to raise revenue, to counterbalance the sales-tax exemption for publications, or to reduce administrative burdens. Absent actual evidence of a proper legislative

purpose, either from legislative history or from examination of the legislative scheme itself, the classifications of the use tax must fall, and the use tax itself must fall with its classifications.

Few classifications which impair fundamental rights can survive the strict scrutiny of the Equal Protection Clause. (L. Tribe, American Constitutional Law, § 16-6 p. 1000 (1978).) The challenged use tax on the consumption of paper and ink products specifically targeted at large publications clearly is not necessary to the accomplishment of a compelling state interest.

B. The Challenged Use Tax Unconstitutionally Discriminates Against the Press in General and Against Sections of the Press in Particular.

Grosjean v. American Press Co., 297 U.S. 233 (1936), remains the leading decision concerning a state's authority to tax the press. The Louisiana legislation scrutinized in *Grosjean* imposed a license tax, amounting to 2% of gross receipts, on all sellers of advertising to be published in newspapers or magazines having a circulation of more than 20,000 copies per week. A unanimous Supreme Court invalidated the statute as an unconstitutional abridgment of freedom of the press. The Supreme Court determined that the license tax:

> operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid . . . , it well might result in destroying both advertising and circulation.
>
> (297 U.S. at 244-45.)

By comparison, during the years in question, the challenged use tax fell upon only a few daily newspapers with a circulation greater than 12,500 copies. As in *Grosjean*, the effect of the use tax is to curtail the amount of revenue realized from publishing newspapers, and the direct tendency of the use tax is to restrict circulation.

Grosjean indicated that the press was not "immune from any of the ordinary forms of taxation for the support of the government." (297 U.S. at 250.) But the Louisiana license tax was invalid because it was "single in kind," directed only at newspapers; because it was further directed at a "selected group of newspapers," with the plain purpose of penalizing their publishers and curtailing their circulation; and because the tax "limit[ed] the circulation of information to which the public is entitled in virtue of the constitutional guaranties." (297 U.S. at 250-51.)

The evil of special taxes on the press arises from the very structure of such taxes, and not from the motives of the legislators who enact the tax. In *City of Tampa v. Tampa Times*, 15 So. 2d 612 (Fla. 1943), the Supreme Court of Florida invalidated an annual city license tax on newspapers of $40 for papers with less than 10,000 circulation, of $500 for papers with circulation between 10,000 and 30,000, and of $700 for papers with circulation in excess of 30,000. The court unanimously held:

> We cannot say that the tax levied here is arbitrary, unreasonable or was actuated by anything other than good motive, however we rest our decision solely upon the proposition that any license tax based on volume of circulation and graduated by scale as it here presented is void as impairing the freedom of the press guaranteed by the First and Fourteenth Amendments to the United States Constitution. (15 So.2d at 612-13).

In 1948, the Minnesota Attorney General advised the Minneapolis City Attorney that the city had no power to adopt a tax on every person, firm or corporation engaged in the business of publishing daily newspapers in the city at the rate of one cent per copy published. The Attorney General concluded that such a tax would be unconstitutional because, among other reasons, it applied only to newspaper publishers, and not to persons engaged in other lines of business; because it applied only to a limited group of publishers, and not to all newspapers, periodicals, and other publication; and because its effect would be to curtail circulation. Minn. Atty. Gen. Op. No. 90 (1948). Since there is no Minnesota decision in point, the opinion of the Attorney General carries considerable weight. *State v. Hartman*, 261 Minn. 314, 321, 112 N.W.2d 340, 345 (1962).

Even if taxes "appear" to be general, which the challenged use tax scheme is not, they may be invalidated if in practical effect they have a disproportionate impact on businesses protected by the First Amendment. In *City of Baltimore v. A. S. Abell Co.*, 145 A.2d 111 (Md. 1958), the Court of Appeals of Maryland, the highest court in that state, invalidated a 4% tax on the gross sales price of advertising, to be paid by the purchasers of advertising, and also invalidated a 2% tax on the gross receipts from the sale of advertising space and time. The tax applied to many forms of advertising, but 90 to 95% of the impact of the tax fell upon newspapers and radio and television stations. The court held:

> [W]hen the tax is imposed upon a business that enjoys one of the constitutional immunities of the First Amendment, it must be general in its nature and character and affect this business only incidentally as it affects other businesses in their combined duty to support the govern-

> ment . . . . The root of the evil in these ordinances lies not merely in the fact that they curtail the dollars received by the newpapers and the stations, but in the fact that being entitled to the advantages granted by the First Amendment, they are singled out and required to pay a special tax that is not required of business in general or some broad portion thereof. (145 A.2d at 118-19.)

The most obvious imperatives of *Grosjean* and its progeny are that: (i) government may not impose a tax which restricts circulation; (ii) government may not tax a select group of publishers, leaving others free of the burden of the tax; and (iii) government may not impose a tax directly upon, or in practical effect having its primary impact upon, publishers in general. Minnesota's use tax on the consumption of paper and ink products by publications ignores all of these imperatives.

The $100,000 exemption results in an effective tax rate which increases as circulation, and consumption of paper and ink products, increases. The $100,000 exemption results in a tax which, like the *Grosjean* tax, falls only upon a small group of the State's largest newspapers. Simply eliminating the $100,000 exemption will not save this tax, because of the third imperative of *Grosjean*. Minn. Stat. §297A.14 makes it clear that this use tax is specifically directed at publications; and, in any event, the tax falls with a disproportionate impact upon publications.

We should never forget what Justice Murphy of the United States Supreme Court stated in *Jones v. City of Opelika*, 319 U.S. 103:

> Liberty of circulation is the very life blood of a free press . . . , and taxes on the circulation of ideas have a long history of misuse against freedom of thought. . . .

> And taxes on circulation solely for the purpose of revenue were successfully resisted, prior to the adoption of the First Amendment, as interferences with freedom of the press.
>
> . . . If freedom of speech and freedom of the press are to have any concrete meaning, people seeking to distribute information and opinion, to the end only that others shall have the benefit thereof, should not be taxed for circulating such matter. . . . It is unnecessary to consider now the validity of such taxes on commercial enterprises engaged in the dissemination of ideas. . . .
>
> The exercise, without commercial motives, of freedom of speech, freedom of the press, or freedom of worship are not proper sources of taxation for general revenue purposes. (316 U.S. at 616-17, 619-20 (Murphy, J.))

CONCLUSION

Star Tribune pays many state and local taxes of general application without protesting their constitutionality. In 1974, it paid $355,000 in real estate taxes, $1,000,000 in state corporate income taxes, and $540,000 in payroll taxes (unemployment, worker's compensation and millage). In 1975, it paid $396,000 in real estate taxes, $1,085,333 in state corporate income taxes, and $561,000 in payroll taxes. Star Tribune is a responsible, "dues paying" corporate citizen of the State of Minnesota.

The challenged use tax is not, however, a tax of general application. It is a limited, special tax, in its effect in the nature of a license tax, which abridges the freedom of the press in four ways:

First, it taxes a select group of Minnesota publishers, leaving other Minnesota publishers free of its burden. This effect results from the $100,000 exemption.

Second, it is specifically and exclusively directed at publications in general; no other industrial users of paper and ink products are subject to this use tax.

Third, its direct tendency, if the tax is to be avoided, is to restrict circulation and thereby reduce the dissemination of information to the general public.

Fourth, it is the practical and legal equivalent of a direct tax on the exercise of a First Amendment right because of its special and limited impact.

Each of these unconstitutional abridgments of Star Tribune's right to freedom of the press mandates that this Court invalidate the challenged use tax.

For all the foregoing reasons this Court has determined that the challenged use tax on paper and ink products denies Star Tribune equal protection of the law and abridges the freedom of the press. Therefore, this Court, invalidates the challenged use tax and orders the return to Star Tribune of $874,265.04 in use taxes it paid.

Let this Memorandum become a part of the within and foregoing Order.

D.T.B.

APPENDIX D

Transcript of Judgment

STATE OF MINNESOTA
IN SUPREME COURT

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Respondent,

vs.

COMMISSIONER OF REVENUE,
Appellant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

Dated and signed January 5, 1982.

By the Court.
Attest:
JOHN McCARTHY
Clerk

State of Minnesota
Supreme Court—ss.

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the case therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, March 9, 1982.

JOHN McCARTHY
Clerk
By WAYNE TSCHIMPERLE
Deputy

APPENDIX E

Amended Notice of Appeal

No. 51616
STATE OF MINNESOTA
IN SUPREME COURT

Minneapolis Star and Tribune Company,
Plaintiff-Respondent,

vs.

Commissioner of Revenue,
Defendant-Appellant.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Minneapolis Star and Tribune Company, plaintiff-respondent herein, hereby appeals to the United States Supreme Court from the judgment entered on January 5, 1982, reversing the judgment entered by the

Hennepin County District Court in favor of plaintiff-respondent. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: March 10, 1982.

JOHN D. FRENCH
LAWRENCE C. BROWN
JOHN P. BORGER
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Minneapolis, MN 55402

AFFIDAVIT OF SERVICE BY MAIL

State of Minnesota
County of Hennepin—ss.

PAMELA GEHLEN of the City of St. Louis Park, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 10th day of March, 1982, she served the annexed Amended Notice of Appeal on the following attorneys by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at Minne-

apolis, Minnesota, directed to said attorneys at the following addresses:

Mr. Paul R. Kempainen
Special Assistant
State of Minnesota
Office of the Attorney General
St. Paul, Minnesota 55155
Mr. Peter Schroth
Professor of Law
1536 Hewitt Avenue
St. Paul, Minnesota 55104

PAMELA GEHLEN

Subscribed and sworn to before me this 10th day of March, 1982. — Marcia Gruenhagen, Notary Public, Dakota County, Minnesota. My commission expires Aug. 26, 1986.

APPENDIX F

Statutes Involved
Changes or additions are indicated by italics,
deletions by capitals in parentheses.
Provisions directly affecting the publications
exemption are reproduced in boldface.

(1) 1971 Laws of Minnesota—Extra Session,
Chapter 31, Article I.

EXTRA SESSION
CHAPTER 31—H.F.No.262
[Coded in Part]

An act relating to the organization, operation, and financing of state and local government; appropriating money therefor; amending Minnesota Statutes 1969, Chapters 6, 124, 275 and 298, by adding sections; and Sections 122.45, by adding a sub-

division; 124.03, by adding a subdivision; 124.04; 124.09; 124.10, Subdivision 3; 124.11; 124.13; 124.17, as amended; 124.215, by adding a subdivision; 124.22, Subdivision 3, as amended; 124.28, Subdivision 3; 168.013, Subdivision 1, as amended; 270.075, Subdivision 1; 272.02, as amended; 272.03, Subdivision 1; 273.12, as amended; 273.13, Subdivisions 4, 7, 9, 13, 14, and 17, as amended, and by adding subdivisions; 273.134; 273.135, as amended; 273.41; 290.06, Subdivisions 1 and 2b, as amended, and 3b, and by adding a subdivision; 290.0601, Subdivisions 6, 8, and 9; 290.0607; 290.0608; 290.09, Subdivision 4, and by adding a subdivision; 290.18, Subdivision 2; 290.361, Subdivisions 2 and 4, as amended; 290.62; 290.92, by adding a subdivision; 290.983, Subdivision 1; 291.09, Subdivision 3; 291.11, Subdivision 1; 291.15; 291.18; 291.35; 294.28; 297.02, Subdivision 1, as amended; 297.03, Subdivision 5; 297.13, Subdivision 1; 297.22, Subdivision 1; 297A.01, Subdivision 3; 297A.02; 297A.03, Subdivision 2; 297A.14, as amended; 297A.25, Subdivision 1, as amended; 297A.51; 297A.57; 298.01, Subdivisions 1 and 2; 298.02, Subdivision 1; 298.25; 298.27; 298.28; 299.01; 298.32; 298.39; 298.396; 299.012, Subdivision 1; 340.47, Subdivisions 1 and 2; 340.60, Subdivision 2; 352.041, Subdivision 5; 353.28, Subdivision 8; 355.299; 393.01, Subdivision 4; 471.61, Subdivision 1, as amended, and 2a; 474.01, Subdivision 5; 474.02, Subdivisions 1 and 2; 474.04; 474.05; and 474.06; Laws 1969, Chapter 857, Section 2; Laws 1971, Chapters 736, Section 1; 853, Sections 2 and 3, and 918, by adding a section; repealing Minnesota Statutes 1969, Chapters 286 and 289; Sections 122.45, Subdivision 3; 124.211; 124.215, Subdivisions 1, as amended, and 2; 124.51; 273.13, Subdivision 5, as amended and 15; 273.69; 275.12; 275.123; 290.06, Subdivision 2; 290.0613; 297.221; 297A.51 to 297A.60; 298.011, as amended; 298.025; 298.41; 298.42;

298.43; 298.44; 298.45; 299.011, as amended; 290.06, Subdivisions 4 and 6, as amended; 290.0613; 290.361, Subdivisions 6 and 7, as amended; 340.47, Subdivisions 3, 4, 5, as amended, and 6; and Laws 1959, Chapter 462, Section 6, as amended; Laws 1961, Chapter 444; Laws 1965, Chapters 240; and 705, Section 1, Subdivisions 12, 13, 14, 15, 16, and 17, as amended; and Laws 1969, Chapter 699, Section 2.

Be it enacted by the Legislature of the State of Minnesota:

ARTICLE I

Section 1. Minnesota Statutes 1969, Section 297A.01, Subdivision 3, is amended to read:

Subd. 3. A "sale" and a "purchase" includes, but is not limited to, each of the following transactions:

(a) Any transfer of title or possession, or both, of tangible personal property, whether absolutely or conditionally, and the leasing of or the granting of a license to use or consume tangible personal property, for a consideration in money or by exchange or barter;

(b) The production, fabrication, printing or processing of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production, fabrication, printing or processing;

(c) The furnishing, preparing or serving for a consideration of food, meals or drinks, not including hospitals, sanatoriums, nursing homes or senior citizens homes, meals and lunches served at public and private schools, universities or colleges, or the occasional meal thereof by a charitable or church organization;

(d) The granting of the privilege of admission to places of amusement or athletic events and the privilege of use of amusement devices;

(e) The furnishing for a consideration of lodging and related services by a hotel, rooming house, tourist court, motel or

trailer camp and of the granting of any similar license to use real property other than the renting or leasing thereof for a continuous period of 30 days or more;

(f) The furnishing for a consideration of electricity, gas, water, or steam for use or consumption within this state, or local exchange telephone service *and intrastate toll service* except such service provided by means of coin operated telephones. (INCLUDING) Sales by municipal corporations in a proprietary capacity *are included in the provisions of this clause.*

Sec. 2. Minnesota Statutes 1969, Section 297A.02, is amended to read:

297A.02 IMPOSITION OF TAX. *Except as otherwise provided in this article,* there is hereby imposed an excise tax of (THREE) *four* percent of the gross receipts (OF ANY PERSON) from sales at retail, as hereinbefore defined, made *by any person* in this state after (JULY 31, 1967) *October 31, 1971.* (IN NO CASE SHALL THE TAX IMPOSED HEREBY UPON THE SELLER EXCEED THE AMOUNT OF TAX WHICH HE IS AUTHORIZED AND REQUIRED BY LAW TO COLLECT FROM THE PURCHASER.)

Notwithstanding the foregoing, the tax imposed hereby upon sales at retail through coin-operated vending machines shall be three percent of the gross receipts of such sales.

Sec. 3. Minnesota Statutes 1969, Section 297A.03, Subdivision 2, is amended to read:

Subd. 2. It shall be unlawful for any retailer to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer, or that it will not be added to the sales price or that, if added, it or any part thereof will be re-

funded except that in computing the tax to be collected as the result of any transaction amounts of tax less than one half of one cent may be disregarded and amounts of tax if one half cent or more may be considered an additional cent. If the sales price of any sale at retail is (16) *12* cents or less, no tax shall be collected. Any person violating this provision shall be guilty of a misdemeanor.

Sec. 4. Minnesota Statutes 1969, Section 297A.14, as amended by Laws 1971, Chapter 430, Section 1, is amended to read:

297A.14 USING, STORING OR CONSUMING TANGIBLE PERSONAL PROPERTY; ADMISSIONS; UTILITIES. For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricty, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of (THREE) *four* percent of the sales price of sales at retail of any of the aforementioned items made to such person after (JULY 31, 1967) *October 31, 1971*, unless the tax imposed by section 297A.02 was paid on said sales price.

Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

Sec. 5. Minnesota Statutes 1969, Section 297A.25, Subdivision 1, as amended by Laws 1971, Chapter 123, Section 1; Laws 1971, Chapter 124, Section 1; and Laws 1971, Chapter 740, Section 2, is amended to read:

297A.25 EXEMPTIONS. Subdivision 1. The following are specifically exempted from the taxes imposed by sections 297A.01 to 297A.44:

(a) The gross receipts from the sale of food products including but not limited to cereal and cereal products, butter, cheese, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, coffee and coffee substitutes, tea, cocoa and cocoa products;

(b) The gross receipts from the sale of prescribed drugs and medicine intended for use, internal or external, in the cure, mitigation, treatment or prevention of illness or disease in human beings and products consumed by humans for the preservation of health, including prescription glasses, therapeutic and prosthetic devices, but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein;

(c) The gross receipts from the sale of and the storage, use or other consumption in Minnesota of tangible personal property, tickets, or admissions, electricity, gas, or local exchange telephone service, which under the Constitution or laws of the United States or under the Constitution of Minnesota, the state of Minnesota is prohibited from taxing;

(d) The gross receipts from the sale of tangible personal property, the ultimate destination of which is outside the state of Minnesota and which is not thereafter returned to a point within Minnesota except in the course of interstate commerce;

(f) The gross receipts from the sale of and storage, use or consumption of petroleum products upon which a tax has been imposed under the provisions of Minnesota Statutes 1965, Chapter 296, whether or not any part of said tax may be subsequently refunded;

(g) The gross receipts from the sale of clothing and wearing apparel except the following:

(i) all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semi-precious stones, and imitations thereof; articles made of, or ornamented, mounted or fitted with precious metals or imitations thereof; watches; clocks; cases and movements for watches and clocks; gold, gold-plated, silver, or sterling flatware or hollow ware and silver-plated hollow ware; opera glasses; lorgnettes; marine glasses; field glasses and binoculars.

(ii) articles made of fur on the hide or pelt, and articles of which such fur is the component material or chief value, but only if such value is more than three times the value of the next most valuable component material.

(iii) perfume, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous and toilet powders. The tax imposed by this act shall not apply to lotion, oil, powder, or other article intended to be used or applied only in the case of babies.

(iv) trunks, valises, traveling bags, suitcases, satchels, overnight bags, hat boxes for use by travelers, beach bags, bathing suit bags, brief cases made of leather or imitation leather, salesmen's sample and display cases, purses, handbags, pocketbooks, wallets, billfolds, card, pass, and key cases and toilet cases.

(h) The gross receipts from the sale of and the storage, use, or consumption of all materials, including chemicals, fuels, petroleum products, lubricants, packaging materials, feeds, seeds, fertilizers, electricity, gas and steam, used or consumed in agricultural or industrial production of personal property intended to be sold ultimately at retail, whether or not the item so used becomes an ingredient or constituent part

of the property produced. Such production shall include, but is not limited to, production of any tangible personal property, manufacturing, processing (other than by restaurants and consumers) of agricultural products whether vegetable or animal, commercial fishing, refining, smelting, reducing, brewing, distilling, printing, mining, quarrying, lumbering, generating electricity and road building. Such production shall not include painting, cleaning, repairing or similar processing of property except as part of the original manufacturing process. Machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures used in such production and fuel, electricity, gas or steam used for space heating or lighting, are not included within this exemption;

(i) The gross receipts from the sale of and storage, use or other consumption in Minnesota of tangible personal property (*except paper or ink products*) which is used or consumed (IN OR BECOMES AN INGREDIENT OR COMPONENT PART OF) *producing* any publication regularly issued at average intervals not exceeding three months (, AND ANY SUCH PUBLICATION). For purposes of this subsection, "publication" as used herein shall include, without limiting the foregoing, a legal newspaper as defined by Minnesota Statutes 1965, Section 331.02, and any supplements or enclosures with or part of said newspaper; and the gross receipts of any advertising contained therein or therewith shall be exempt. For this purpose, advertising in any such publication shall be deemed to be a service and not tangible personal property, and persons or their agents who publish or sell such newspapers shall be deemed to be engaging in a service with respect to gross receipts realized from such newsgathering or publishing activities by them, including the sale of advertising. Machinery, equipment, implements, tools, accessories, appliances, con-

trivances, furniture and fixtures used in such publication and fuel, electricity, gas or steam used for space heating or lighting, are not (INCLUDED WITHIN THIS EXEMPTION) ***exempt*****;**

(j) The gross receipts from all sales of tangible personal property to, and all storage, use or consumption of such property by, the United States and its agencies and instrumentalities or **(THE)** *a* state **(OF MINNESOTA)** and its agencies, instrumentalities and political subdivisions;

(k) The gross receipts from the isolated or occasional sale of tangible personal property in Minnesota not made in the normal course of business of selling that kind of property, and the storage, use, or consumption of property acquired as a result of such a sale;

((L) THE GROSS RECEIPTS FROM SALES OF TANGIBLE PERSONAL PROPERTY TO, AND THE STORAGE, USE OR OTHER CONSUMPTION OF SUCH PROPERTY BY PERSONS TAXED ON THE GROSS EARNINGS BASIS IN LIEU OF AD VALOREM TAXES UNDER THE PROVISIONS OF MINNESOTA STATUTES 1965, CHAPTERS 294 AND 295, AND BY PERSONS TAXED FOR AD VALOREM TAX PURPOSES UNDER THE IN LIEU PROVISIONS OF MINNESOTA STATUTES 1965, CHAPTER 298; PROVIDED, HOWEVER, THAT THE EXCLUSION GRANTED TO PERSONS TAXED UNDER THE PROVISIONS OF CHAPTER 298, SHALL NOT APPLY TO MACHINERY, EQUIPMENT, IMPLEMENTS, TOOLS, ACCESSORIES, APPLIANCES, CONTRIVANCES, FURNITURE, SUPPLIES, FIXTURES AND OTHER TANGIBLE ITEMS PURCHASED FOR THE PURPOSES OF ADMINISTRATION, INCLUDING, BUT NOT LIMITED TO, MANAGEMENT, ACCOUNTING, ADVERTISING, INDUSTRIAL AND PUBLIC RELATIONS FUNCTIONS;)

(l) The gross receipts from sales of rolling stock and the storage, use or other consumption of such property by railroads, freight line companies, sleeping car companies and express companies taxed on the gross earnings basis in lieu of ad valorem taxes. For purposes of this clause "rolling stock" is defined as the portable or moving apparatus and machinery of any such company which moves on the road, and includes, but is not limited to, engines, cars, tenders, coaches, sleeping cars and parts necessary for the repair and maintenance of such rolling stock.

((M) THE GROSS RECEIPTS FROM SALES OF TANGIBLE PERSONAL PROPERTY TO, AND THE STORAGE, USE, OR OTHER CONSUMPTION OF SUCH PROPERTY BY PERSONS TAXED UNDER THE PROVISIONS OF MINNESOTA STATUTES 1965, Sections 270.071 TO 270.079, INCLUSIVE;)

(m) The gross receipts from sales of airflight equipment and the storage, use or other consumption of such property by airline companies taxed under the provisions of Minnesota Statutes 1969, Sections 270.071 to 270.079, inclusive. For purposes of this clause, "airflight equipment" includes airplanes and parts necessary for the repair and maintenance of such airflight equipment, and flight simulators.

(n) The gross receipts from the sale of telephone central office telephone equipment used in furnishing intrastate and interstate telephone service to the public.

(o) The gross receipts from the sale of and the storage, use or other consumption by persons taxed under the in lieu provisions of Minnesota Statutes 1969, Chapter 298, of mill liners, grinding rods and grinding balls which are substantially consumed in the production of taconite, the material of which primarily is added to and becomes a part of the material being processed.

((N)) *(p)* The gross receipts from the sale of tangible personal property to, and the storage, use or other consumption of such property by, any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes;

((O)) *(q)* The gross receipts from the sale of caskets and burial vaults;

((P)) *(r)* The gross receipts from the sale of cigarettes.

((Q)) *(s)* The gross receipts from the sale of an automobile or other conveyance if the purchaser is assisted by a grant from the United States in accordance with 38 United States code, Section 1901, as amended.

((Q)) *(t)* The gross receipts from the sale to the licensed aircraft dealer of an aircraft for which a commercial use permit has been issued pursuant to section 1 *of Laws 1971, Chapter 740,* if the aircraft is resold while the permit is in effect.

((R)) *(u)* The gross receipts from the sale of building materials to be used in the construction or remodeling of a residence when the construction or remodeling is financed in whole or in part by the United States in accordance with 38 United States Code, Sections 801 to 805, as amended. This exemption shall not be effective at time of sale of the materials to contractors, subcontractors, builders or owners, but shall be applicable only upon a claim for refund to the commissioner of taxation filed by recipients of the benefits provided in Title 38 United States Code, Chapter 21, as amended. The Commissioner shall provide by regulation for the refund of taxes paid on sales exempt in accordance with this paragraph.

Sec. 6. *The increase in tax levied by this article shall not apply to the gross receipts from sales at retail made pursuant to bona fide written contracts, nor to lump sum or fixed price construction contracts which unconditionally vest the rights*

and obligations of the parties thereto and which do not make provision for allocation of future taxes; provided that such contracts were enforceable prior to November 1, 1971; and further provided that (1) in the case of construction contracts the delivery of tangible personal property used in performing such construction contract is made on or prior to November 1, 1972, and (2) in the case of all other contracts subject to this section the delivery of tangible personal property subject thereto is made on or prior to December 15, 1971.

Sec. 7. Minnesota Statutes 1969, Section 297A.51, is amended to read:

297A.51 DISTRIBUTION OF TAX PROCEEDS. One-fourth of the sum of the revenues transferred to the general fund pursuant to section 297.13, subdivision 1, plus the amount which the tax imposed by sections 297A.01 to 297A.44 raises annually shall be distributed to townships, cities, villages, boroughs, counties and school districts as provided in sections 297A.51 to 297A.60. *This section shall not apply to any distributions made after the calendar year 1971.*

Sec. 8. *Except as otherwise provided herein, sections 1 to 7 are effective as to all sales made after October 31, 1971.*

Sec. 9. Laws 1971, Chapter 853, Section 2, is amended to read:

Sec. 2. [297B.02] TAX IMPOSED. There is hereby imposed an excise tax at the rate (OF THREE PERCENT) *provided in Minnesota Statutes, Chapter 297A* on the purchase price of any motor vehicle purchased or acquired, either in or outside of the state of Minnesota, which is required to be registered under the laws of this state.

Sec. 10. Laws 1971, Chapter 853, Section 3, is amended to read:

Sec. 3. [297B.03] EXEMPTIONS. There is specifically exempted from the provisions of this chapter and from computation of the amount of tax imposed by it the following:

(1) Purchase or use of any motor vehicle by any person described in and subject to the conditions provided in Minnesota Statutes, Section 297A.25, Subdivision 1, Clauses (j), ((L), (M), (N) AND (Q)) *(p) and (s).*

(2) Purchase or use of any motor vehicle by any person who was a resident of another state at the time of the purchase and who subsequently becomes a resident of Minnesota, provided the purchase occurred more than 60 days prior to the date such person moved his residence to the state of Minnesota.

(3) Purchase or use of any motor vehicle by any person making a valid election to be taxed under the provisions of Laws 1971, Chapter 115.

Sec. 11. *The provisions of sections 9 and 10 shall be effective January 1, 1972.*

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Approved October 30, 1971.

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(2) 1973 Laws of Minnesota,
Chapter 650, Article XIII.

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CHAPTER 650 — H. F. NO. 2121
[Coded in Part]

An act relating to government; raising revenue; providing for the administration of public welfare and other public activities; appropriating money; providing penalties; amending Minnesota Statutes 1971, Chapters 272; 273; 275; and 290; by adding sections; Sections 93.52, Subdivision 2; 93.55; 93.58;

124.03, Subdivision 3; 245.77; 261.04, Subdivision 1; 261.063; 272.02, Subdivision 1; 272.03, Subdivision 1; 272.04, Subdivision 1; 273.11; 273.13, Subdivisions 4, 6, and 7, and by adding a subdivision; 273.134; 273.41; 275.09, Subdivision 3; 275.50, Subdivisions 2, 4, and 5; 275.51, Subdivisions 1, 2, 3, 4, and by adding a subdivision; 275.52, Subdivisions 2 and 3; 275.53, Subdivisions 1 and 3; 275.55; 287.12; 290.06, Subdivision 1; 290.0601, Subdivisions 6 and 9; 290.0604; 290.061; 290.081; 290.17; 290.19, Subdivision 1, and by adding a subdivision; 290.361, Subdivisions 2 and 4; 290.982; 290.983, Subdivision 1; 290.99; 291.33, Subdivision 2; 293.07, Subdivision 2; 297.13, Subdivision 1; 297A.14; 297A.25, Subdivision 1; 340.60, Subdivision 1; 376.424; 393.01, Subdivision 3; 393.07, Subdivision 2, 393.08, Subdivision 1; 414.01, by adding a subdivision; and 477A.01, Subdivisions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 16, and 17; repealing Minnesota Statutes 1971, Sections 93.53; 93.54; 93.56; 93.57; 245.46; 261.01; 261.02; 261.03; 261.05; 261.06; 261.061; 261.064; 261.065; 261.066; 261.067; 261.07; 261.08; 261.10; 261.11; 261.123; 261.124; 261.125; 261.126; 261.14; 261.141; 261.142; 261.143; 261.26; 276.15; 276.16; 276.17; 276.18; 290.0607; 290.0617; 295.38; 297.13, Subdivisions 2, 3, 4, 5, 6, 7, and 8; 297.15; 297.16; 297A.252; 340.60, Subdivisions 2, 3, 4, 5, 6, and 7; 368.39; 368.40; 368.41; 368.42; 373.20; 373.21; 373.22; 373.23; 373.24; 393.08, Subdivision 2; and 477A.01, Subdivisions 12 and 15.

Be it enacted by the Legislature of the State of Minnesota:

* * * * *

ARTICLE XIII

Section 1. Minnesota Statutes 1971, Section 297A.14, is amended to read:

297A.14 USING, STORING OR CONSUMING TANGIBLE PERSONAL PROPERTY; ADMISSIONS; UTILITIES.

For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 was paid on said sales price.

Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section.

Sec. 2. Minnesota Statutes 1971, Section 297A.25, Subdivision 1, is amended to read:

297A.25 EXEMPTIONS. Subdivision 1. The following are specifically exempted from the taxes imposed by sections 297A.01 to 297A.44:

(a) The gross receipts from the sale of food products including but not limited to cereal and cereal products, butter, cheese, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, coffee and coffee substitutes, tea, cocoa and cocoa products;

(b) The gross receipts from the sale of prescribed drugs and medicine intended for use, internal or external, in the

cure, mitigation, treatment or prevention of illness or disease in human beings and products consumed by humans for the preservation of health, including prescription glasses, therapeutic and prosthetic devices, but not including cosmetics or toilet articles notwithstanding the presence of medicinal ingredients therein;

(c) The gross receipts from the sale of and the storage, use or other consumption in Minnesota of tangible personal property, tickets, or admissions, electricity, gas, or local exchange telephone service, which under the Constitution or laws of the United States or under the Constitution of Minnesota, the state of Minnesota is prohibited from taxing;

(d) The gross receipts from the sale of tangible personal property, the ultimate destination of which is outside the state of Minnesota and which is not thereafter returned to a point within Minnesota except in the course of interstate commerce;

(f) The gross receipts from the sale of and storage, use or consumption of petroleum products upon which a tax has been imposed under the provisions of chapter 296, whether or not any part of said tax may be subsequently refunded;

(g) The gross receipts from the sale of clothing and wearing apparel except the following:

(i) all articles commonly or commercially known as jewelry, whether real or imitation; pearls, precious and semiprecious stones, and imitations thereof; articles made of, or ornamented, mounted or fitted with precious metals or imitations thereof; watches; clocks; cases and movements for watches and clocks; gold, gold-plated, silver, or sterling flatware or hollow ware and silver-plated hollow ware; opera glasses; lorgnettes; marine glasses; field glasses and binoculars.

(ii) articles made of fur on the hide or pelt, and articles of which such fur is the component material or chief value, but only if such value is more than three times the value of the next most valuable component material.

(iii) perfume, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous and toilet powders. The tax imposed by this act shall not apply to lotion, oil, powder, or other article intended to be used or applied only in the case of babies.

(iv) trunks, valises, traveling bags, suitcases, satchels, overnight bags, hat boxes for use by travelers, beach bags, bathing suit bags, brief cases made of leather or imitation leather, salesmen's sample and display cases, purses, handbags, pocketbooks, wallets, billfolds, card, pass, and key cases and toilet cases.

(h) The gross receipts from the sale of and the storage, use, or consumption of all materials, including chemicals, fuels, petroleum products, lubricants, packaging materials, *including returnable containers used in packaging food and beverage products*, feeds, seeds, fertilizers, electricity, gas and steam, used or consumed in agricultural or industrial production of personal property intended to be sold ultimately at retail, whether or not the item so used becomes an ingredient or constituent part of the property produced. Such production shall include, but is not limited to, *research, development, design or* production of any tangible personal property, manufacturing, processing (other than by restaurants and consumers) of agricultural products whether vegetable or animal, commercial fishing, refining, smelting, reducing, brewing, distilling, printing, mining, quarrying, lumbering, generating electricity and road building. Such production shall not include

painting, cleaning, repairing or similar processing of property except as part of the original manufacturing process. Machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures, used in such production and fuel, electricity, gas or steam used for space heating or lighting, are not included within this exemption; *however, accessory tools, equipment and other short lived items, which are separate detachable units used in producing a direct effect upon the product, where such items have an ordinary useful life of less than 12 months, are included within the exemption provided herein;*

(i) The gross receipts from the sale of and storage, use or other consumption in Minnesota of tangible personal property (except (PAPER OR INK PRODUCTS) *as provided in section 297A.14*) which is used or consumed in producing any publication regularly issued at average intervals not exceeding three months, *and any such publication.* For purposes of this subsection, "publication" as used herein shall include, without limiting the foregoing, a legal newspaper as defined by Minnesota Statutes 1965, Section 331.02, and any supplements or enclosures with or part of said newspaper; and the gross receipts of any advertising contained therein or therewith shall be exempt. For this purpose, advertising in any such publication shall be deemed to be a service and not tangible personal property, and persons or their agents who publish or sell such newspapers shall be deemed to be engaging in a service with respect to gross receipts realized from such newsgathering or publishing activities by them, including the sale of advertising. Machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures used in such publication and fuel, electricity, gas or steam used for space heating or lighting, are not exempt;

(j) The gross receipts from all sales of tangible personal property to, and all storage, use or consumption of such property by, the United States and its agencies and instrumentalities or a state and its agencies, instrumentalities and political subdivisions;

(k) The gross receipts from the isolated or occasional sale of tangible personal property in Minnesota not made in the normal course of business of selling that kind of property, and the storage, use, or consumption of property acquired as a result of such a sale;

(l) The gross receipts from sales of rolling stock and the storage, use or other consumption of such property by railroads, freight line companies, sleeping car companies and express companies taxed on the gross earnings basis in lieu of ad valorem taxes. For purposes of this clause "rolling stock" is defined as the portable or moving apparatus and machinery of any such company which moves on the road, and includes, but is not limited to, engines, cars, tenders, coaches, sleeping cars and parts necessary for the repair and maintenance of such rolling stock.

(m) The gross receipts from sales of airflight equipment and the storage, use or other consumption of such property by airline companies taxed under the provisions of sections 270.-071 to 270.079. For purposes of this clause, "airflight equipment" includes airplanes and parts necessary for the repair and maintenance of such airflight equipment, and flight simulators.

(n) The gross receipts from the sale of telephone central office telephone equipment used in furnishing intrastate and interstate telephone service to the public.

(o) The gross receipts from the sale of and the storage, use or other consumption by persons taxed under the in lieu provi-

sions of chapter 298, of mill liners, grinding rods and grinding balls which are substantially consumed in the production of taconite, the material of which primarily is added to and becomes a part of the material being processed.

(p) The gross receipts from the sale of tangible personal property to, and the storage, use or other consumption of such property by, any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes;

(q) The gross receipts from the sale of caskets and burial vaults;

(r) The gross receipts from the sale of cigarettes.

(s) The gross receipts from the sale of an automobile or other conveyance if the purchaser is assisted by a grant from the United States in accordance with 38 United States Code, Section 1901, as amended.

(t) The gross receipts from the sale to the licensed aircraft dealer of an aircraft for which a commercial use permit has been issued pursuant to section 360.654, if the aircraft is resold while the permit is in effect.

(u) The gross receipts from the sale of building materials to be used in the construction or remodeling of a residence when the construction or remodeling is financed in whole or in part by the United States in accordance with 38 United States Code, Sections 801 to 805, as amended. This exemption shall not be effective at time of sale of the materials to contractors, subcontractors, builders or owners, but shall be applicable only upon a claim for refund to the commissioner of taxation filed by recipients of the benefits provided in Title 38 United States Code, Chapter 21, as amended. The commissioner shall provide by regulation for the refund of taxes paid on sales exempt in accordance with this paragraph.

(v) The gross receipts from the sale of textbooks which are prescribed for use in conjunction with a course of study in a public or private school, college, university and business or trade school to students who are regularly enrolled at such institutions. For purposes of this clause a "public school" is defined as one that furnishes course of study, enrollment and staff that meets standards of the state board of education and a private school is one which under the standards of the state board of education, provides an education substantially equivalent to that furnished at a public school. Business and trade schools shall mean such schools licensed pursuant to Minnesota Statutes, Section 141.25.

(w) The gross receipts from the sale of and the storage of material designed to advertise and promote the sale of merchandise or services, which material is purchased and stored for the purpose of subsequently shipping or otherwise transferring outside the state by the purchaser for use thereafter solely outside the state of Minnesota.

Sec. 3. *Minnesota Statutes 1971, Section 297A.252, is repealed.*

Sec. 4. *The provisions of this article shall be effective after December 31, 1973.*

* * * * *

APPENDIX G

Calculation of Effective Rate of Use Tax on Paper and Ink Products (originally submitted as Appendix E to Star Tribune's Memorandum in Support of Motion for Summary Judgment).

Introduction

The effective rate of use tax is calculated by multiplying the actual tax paid [at a rate of 4 per cent] by 25 to determine the

cost of paper and ink products subject to tax, then adding the $100,000 exemption to determine the total cost of paper and ink products consumed by each publication, and then dividing the actual tax paid by the total cost of paper and ink products consumed, as follows:

$$\frac{\text{tax paid}}{25\ (\text{tax paid}) + \$100{,}000} = \text{effective rate of tax}$$

The figures for the Minneapolis, St. Paul and Duluth newspapers assume that the publishers took two exemptions of $100,000 (one for the morning and Sunday publication and one for the evening publication).

1974 TAX TABLE

Newspaper	Effective Rate of Use Tax on Paper and Ink Products
Minneapolis Star (Evening)	3.948%
Tribune (Morning)	
Tribune (Sunday)	
St. Paul Dispatch (Evening)	3.848%
Pioneer Press (Morning)	
Pioneer Press (Sunday)	
Duluth Herald (Evening)	3.234%
News-Tribune (Morning)	
News-Tribune (Sunday)	
Rochester Post-Bulletin	3.355%
St. Cloud Times	3.13%
Mankato Free Press	2.641%
Winona Daily News	1.728%
Worthington Daily Globe	.207%
Willmar West Central Daily Tribune	1.061%
Virginia Mesabi Daily News	.722%
Fergus Falls Daily Journal	.117%

1975 TAX TABLE

Newspaper	Effective Rate of Use Tax on Paper and Ink Products
Minneapolis Star (Evening)	3.950%
Tribune (Morning)	
Tribune (Sunday)	
St. Paul Dispatch (Evening)	3.858%
Pioneer Press (Morning)	
Pioneer Press (Sunday)	
Duluth Herald (Evening)	3.326%
News-Tribune (Morning)	
News-Tribune (Sunday)	
Rochester Post-Bulletin	3.313%
St. Cloud Times	3.037%
Mankato Free Press	2.802%
Winona Free Press	1.189%
Willmar West Central Daily Tribune	1.428%
Worthington Daily Globe	.752%
Virginia Mesabi Daily News	1.43 %
Fergus Falls Daily Journal	.198%
Brainerd Daily Dispatch	.564%
Austin Daily Herald	1.166%

Office-Supreme Court, U.S.
FILED
JUL 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

APPEAL FROM THE SUPREME COURT OF MINNESOTA

JOINT APPENDIX

LAWRENCE C. BROWN
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1300 Northwestern
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Counsel for Appellee

APPEAL DOCKETED APRIL 2, 1982.
PROBABLE JURISDICTION NOTED JUNE 21, 1982.

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August 27, 1975—Summons and Complaint filed in Hennepin County District Court, State of Minnesota.

January 25, 1980—Plaintiff's special term note of issue, notice of motion and motion for summary judgment filed.

March 19, 1980—Defendant's answer filed.

March 31, 1980—Plaintiff's motion for summary judgment heard.

May 30, 1980—Order and memorandum granting motion for summary judgment filed, with stay of 30 days.

July 1, 1980—Judgment of District Court entered.

July 24, 1980—Notice of appeal to Minnesota Supreme Court filed.

May 4, 1981—Oral argument before Minnesota Supreme Court.

December 17, 1981—Opinion and syllabus of Minnesota Supreme Court filed, reversing judgment of Hennepin County District Court.

January 5, 1982—Judgment of reversal entered.

January 18, 1982—Notice of appeal to United States Supreme Court filed.

March 12, 1982—Amended notice of appeal to United States Supreme Court filed.

Pursuant to Rule 30.1, the following items are not reproduced herein, having previously been reproduced in the Appendix to Jurisdictional Statement submitted on April 2, 1982, at the referenced pages:

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APPENDIX H
Summons and Complaint

STATE OF MINNESOTA
COUNTY OF
HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

File No. 718018

Minneapolis Star and Tribune Company,
Plaintiff,

vs.

Commissioner of Revenue,
Defendant.

SUMMONS

THE STATE OF MINNESOTA TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned and required to serve upon plaintiff's attorneys an answer to the complaint which is herewith served upon you within twenty (20) days after the service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated: August 26, 1975.

JACK D. GAGE
BRUCE A. ACKERMAN
Attorneys for Plaintiff
1300 Northwestern
Bank Building
Minneapolis, Minnesota 55402
Telephone: (612) 338-7571

Of Counsel:
FAEGRE & BENSON
1300 Northwestern
Bank Building
Minneapolis, Minnesota 55402

(Caption omitted in printing)

COMPLAINT

For its complaint against defendant, plaintiff states and alleges that:

1. This action is brought under section 297A.35 of the Minnesota Statutes to recover overpayments of use taxes imposed by the State of Minnesota.

2. Plaintiff is a corporation under the laws of Minnesota whose principal place of business is 425 Portland Avenue, Minneapolis, Minnesota 55488.

3. Plaintiff is engaged in the business of publishing newspapers in the State of Minnesota and has been so engaged throughout the period January 1, 1974 through May 31, 1975. The newspapers so published constitute publications which are regularly issued at average intervals not exceeding three months within the meaning of section 297A.25, subd. 1(i) of the Minnesota Statutes.

4. During the period beginning January 1, 1974 and ending May 31, 1975, plaintiff purchased paper and ink products which were used or consumed in producing such newspapers. In compliance with section 297A.14 of the Minnesota Statutes, which provides that the cost of such paper and ink products exceeding $100,000 in any calendar year is subject to use tax, plaintiff paid use taxes with respect to the cost of such paper and ink products in the amount of $874,265.04.

5. By virtue of the interaction of sections 297A.14 and 297A.25, subd. 1(i) of the Minnesota Statutes, plaintiff is one of only approximately ten publishers of newspapers in the State of Minnesota on which the aforementioned use tax is imposed. Other publishers in the State of Minnesota, more than three hundred in number, do not pay such use tax because the cost of the paper and ink products they consume in producing their newspapers is $100,000 or less in any calendar year, and therefore is exempt from such use tax as provided by section 297A.25, subd. 1(i) of the Minnesota Statutes.

6. On August 5, 1975, plaintiff filed with the Sales and Use Tax Division of the Minnesota Department of Revenue a claim for refund of such use taxes in the amount of $874,265.04. The reasons set forth in such claim for refund were as follows:

> Minnesota Statutes 297A.14 and 297A.25, subd. 1(i), as amended respectively by Article XIII, Minn. Laws 1973, c.650, sections 1 and 2, effective January 1, 1974, together provide that the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication issued at average intervals not exceeding three months, is subject to the Minnesota use tax. Whereas all purchases of paper and ink products used for such purposes were originally exempt from use tax under the sales and use tax statute, and then were all subsequently subject to the use tax as a result of an amendment to M.S. §297A.25, subd. 1(i) made by the Minnesota legislature in 1971 (Minn. Laws 1971, c.31), under the statutory provisions as amended in 1973 and in effect since January 1, 1974, only a small number of the largest newspapers in Minnesota are subject to the use tax on purchases of paper and ink products.

It is the position of the Minneapolis Star and Tribune Company that the 1973 legislation is discriminatory and an abuse of the taxing power of the legislature, and deprives the Company of due process of law and the equal protection of the laws under the Minnesota Constitution of 1857 and the Minnesota Constitution as amended and restructured on November 5, 1974 (Art. 1, Sec. 2; Art. 1, Sec. 7; Art. 4, Sec. 33; Art. 4, Sec. 34; Art. 9; Sec. 1 for the 1857 Constitution, and Art. 1, Sec. 2; Art. 1, Sec. 7; Art. 10, Sec. 1 and Art. 12, Sec. 1 of the restructured Constitution), and also deprives the Company of due process of law and the equal protection of the laws under the 14th Amendment to the Constitution of the United States.

It is the further position of the Minneapolis Star and Tribune Company that the 1973 legislation violates the Company's right to freedom of speech and freedom of the press guaranteed to the Company by the Minnesota Constitution (Art. 1, Sec. 3 of both the 1857 Constitution and the Constitution as amended and restructured on November 5, 1974) and by the 1st and 14th Amendments to the Constitution of the United States.

7. By order of the defendant dated August 6, 1975, Donald S. Mundahl, the Director of the Sales and Use Tax Division of the Minnesota Department of Revenue, notified plaintiff of the denial of said claim for refund in its entirety.

8. The denial of said claim for refund was in error for the reasons enumerated in such claim and set forth herein in paragraph 6. In particular, it is constitutionally impermissible to impose a use tax on paper and ink products used or consumed in producing a newspaper where the sole criterion for imposing such tax is the amount of paper and ink products consumed

by the taxpayer during the taxable year. Such a criterion is not based on any rational distinction between taxpayers subject to the tax, and its effect, whether intended or not, is to impermissibly select and discriminate against certain particular taxpayers within a broad class. In actual fact, by virtue of the size of the exemption, the tax involved herein was intended by the Legislature to be paid by only a small number of the largest newspapers in the State of Minnesota, and the $100,000 exemption figure accomplished just such a result. Imposition of the tax therefore deprives the plaintiff of the due process and equal protection of the laws under both the Minnesota and United States Constitutions, and additionally denies the plaintiff the right to freedom of speech and freedom of the press guaranteed to the plaintiff under each of such Constitutions.

WHEREFORE, the plaintiff demands judgment against defendant in the amount of $874,265.04 with interest thereon as provided by law and its costs and disbursements herein, together with such other and further relief as may be just and equitable in the circumstances.

Dated: August 26, 1975.

JACK D. GAGE
BRUCE A. ACKERMAN
Attorneys for Plaintiff
1300 Northwestern
Bank Building
Minneapolis, Minnesota 55402
Telephone: (612) 338-7571
Of Counsel:
FAEGRE & BENSON
1300 Northwestern
Bank Building
Minneapolis, Minn. 55402

(Affidavit of service omitted in printing)

APPENDIX I
Answer

(Caption omitted in printing)

ANSWER

The Commissioner of Revenue, defendant herein, for his Answer to the Complaint herein:

I

Admits the allegations in paragraphs 1, 2, 3, 6, 7 and in the first sentence of paragraph 4 of said Complaint.

II

Specifically denies the allegations in paragraph 8, and all allegations which state or imply that Minnesota Statutes 1974, Sections 297A.14 and 297A.25, subd. 1(i), contravene the due process or equal protection provision of the Minnesota Constitution or the United States Constitution, or deprive the plaintiff of the right to freedom of speech or freedom of the press guaranteed under said Constitutions.

III

Except as hereinbefore admitted, qualified or otherwise answered, alleges that he is without knowledge or information sufficient to form a belief as to the truth of any or all of the allegations in said Complaint, and hence denies the same.

WHEREFORE defendant prays that the Court deny the relief requested by the plaintiff and render judgment for the defendant, together with his costs and disbursements herein.

Dated: September 2, 1975.

WARREN SPANNAUS
Attorney General
C. H. LUTHER
Deputy Attorney General
Department of Revenue
Centennial Office Building
St. Paul, Minnesota 55145
ATTORNEYS FOR
DEFENDANT

APPENDIX J

Notice of Motion and Motion for Summary Judgment

(Caption omitted in printing)

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To: The Defendant above named and his attorneys, The Honorable Warren Spannaus, Esq., Attorney General, and C. H. Luther, Esq., Deputy Attorney General, Department of Revenue, 249 Centennial Office Building, St. Paul, Minnesota 55415:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Minneapolis Star and Tribune Company, will move the Court, at a Special Term thereof, before The Honorable Patrick W. Fitzgerald, 1553 Court Tower, Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota, on February 21, 1980, at 9:30 o'clock a.m., or as soon thereafter as counsel may be heard, pursuant to Minn. R. Civ. P. 56, for summary judgment on the grounds that there are no genuine issues as to any material facts and that Plaintiff is entitled to the relief prayed for in its Complaint as a matter of law.

This motion is based upon all of the files, records and proceedings herein, together with the Affidavits and Memorandum attached hereto.

Dated: January 25, 1980.

LAWRENCE C. BROWN
JOHN K. STEFFEN
JOHN P. BORGER
Attorneys for Plaintiff
Minneapolis Star and
Tribune Company
1300 Northwestern
Bank Building
Minneapolis, Minnesota 55402
Phone: (612) 371-5300
Of Counsel:
FAEGRE & BENSON
1300 Northwestern
Bank Building
Minneapolis, Minnesota 55402
NORTON L. ARMOUR, Esq.
Assistant Secretary and
General Counsel
Minneapolis Star and
Tribune Company
425 Portland Avenue
Minneapolis, Minnesota 55488

(Affidavit of service omitted in printing)

APPENDIX K
Affidavit of Donald R. Dwight

(Caption omitted in printing)

AFFIDAVIT OF DONALD R. DWIGHT

Donald R. Dwight, being duly sworn upon oath, states:

1. I am a Senior Vice President of the Minneapolis Star and Tribune Company ("Star Tribune") and Publisher of The Minneapolis Star and the Minneapolis Tribune, and make this Affidavit based upon facts known to me to be true, or upon information derived from the files and records of Star Tribune which I believe to be true.

2. Star Tribune is a publisher of newspapers in the State of Minnesota. It publishes a daily morning edition five (5) days a week, a daily evening edition five (5) days a week, and two separate weekly editions on Saturday and Sunday. During 1974 and 1975, Star Tribune published a daily morning edition six (6) days a week, a daily evening edition six (6) days a week, and a Sunday edition.

3. The two physical components of a newspaper are newsprint (paper) and ink. During the seventeen (17) month period of time involved in this civil action, *viz*, January 1, 1974, through May 31, 1975, Star Tribune paid use taxes on its purchases of newsprint (paper) and ink in excess of $100,000 totalling $874,265.04.

4. The financial records of Star Tribune are maintained on a fiscal year basis, with Star Tribune's fiscal year ending on the last Saturday in February each year. During Star Tribune's fiscal years ending February 23, 1974, and February 22, 1975, Star Tribune's net circulation revenues were $19,874,213 and $21,244,567, respectively. If, instead of imposing a 4% use tax on Star Tribune's purchases of news-

print (paper) and ink in excess of $100,000, the State of Minnesota had imposed a 3% tax on Star Tribune's net circulation revenues, the results would have been approximately as reflected below:

1974: 2/12ths of $19,874,213 = $3,312,369
x .03
$99,371.07

plus

1975: 12/12ths of $21,244,567 = $21,244,567
x .03
$637,337.01

plus

3/12ths of $21,244,567 = $5,311,142
(to account for March-May, 1975)
x .03
$159,334.26

Total Newsprint (Paper) and Ink Use Taxes Paid By Star Tribune for the Period 1/1/74 - 5/31/75	Calculation of Alternative 3% Tax on Net Revenues for the Period 1/1/74 - 5/31/75
$874,265.04	$ 99,371.07
	637,337.01
	159,334.26
	$896,042.34

Thus, it can be seen that the State of Minnesota, by imposing a 4% use tax on Star Tribune's purchases of newsprint

(paper) and ink in excess of $100,000, is accomplishing approximately the same result as if it had imposed a 3% tax on Star Tribune's net circulation revenues.

6. Star Tribune's cost of newsprint (paper) and ink typically represents twenty (20) to twenty-five (25) percent of each dollar of operating expense. In terms of newsprint (paper) consumed, approximately 86% to 92% becomes newspapers actually distributed to readers, with the remaining 8% to 14% representing waste.

7. For Star Tribune's fiscal years 1974 and 1975, Star Tribune paid the following additional taxes to the State of Minnesota:

	1974	1975
Real Estate	$ 355,000	$ 396,000
Corporate Income	$1,000,000	$1,085,333

8. In addition, for calendar years 1974 and 1975, Star Tribune paid payroll taxes to the State of Minnesota of $540,000 and $561,000, respectively (unemployment, worker's compensation and millage).

9. The foregoing tax figures demonstrate that Star Tribune is a responsible "dues paying" corporate citizen of the State of Minnesota.

Further Affiant Sayeth Not.

Dated: January 23, 1980.

DONALD R. DWIGHT

Subscribed and sworn to before me this 23rd day of January, 1980. W. Jean Brewer, Notary Public.

APPENDIX L
Affidavit of Norton L. Armour

(Caption omitted in printing)

AFFIDAVIT OF NORTON L. ARMOUR

Norton L. Armour, first being duly sworn, states:

1. I am Assistant Secretary and General Counsel of Minneapolis Star and Tribune Company ("Star Tribune"), and make this Affidavit based upon facts known to me to be true, or upon information derived from the files and records of Star Tribune which I believe to be true.

2. Attached hereto marked *Exhibit 1* is a true copy of Star Tribune's sales and use tax Claim For Refund dated August 4, 1975, the original of which was received by the Director of the Sales and Use Tax Division of the Department of Revenue, State of Minnesota on August 5, 1975. The schedule of use tax payments, which is the third page of *Exhibit 1*, reflects that, for the seventeen (17) month period of time involved in this civil action, *viz*, January 1, 1974 through May 31, 1975, Star Tribune incurred and paid use taxes on its purchases of newsprint (paper) and ink, as follows:

Aggregate Tax on Newsprint Purchases	Aggregate Tax on Ink Purchases	Total Tax
$846,846.15	$27,418.89	$874,265.04

3. Attached hereto marked *Exhibit 2* is a true copy of the Order Determining Sales and Use Tax Liability bearing the date of August 6, 1975, by which Order Star Tribune's Claim For Refund (*Exhibit 1*) was denied in its entirety.

4. This civil action was commenced on August 27, 1975. By Answer dated September 2, 1975, the Commissioner of

Revenue, defendant in this civil action, admitted the allegations contained in "paragraphs 1, 2, 3, 6, 7 and the first sentence of paragraph 4" of Star Tribune's Complaint. By virtue of the pleadings, the following allegations contained in Star Tribune's Complaint have been admitted:

1. This action is brought under section 297A.35 of the Minnesota Statutes to recover overpayments of use taxes imposed by the State of Minnesota.

2. Plaintiff is a corporation under the laws of Minnesota [*sic*, Delaware] whose principal place of business is 425 Portland Avenue, Minneapolis, Minnesota 55488.

3. Plaintiff is engaged in the business of publishing newspapers in the State of Minnesota and has been so engaged throughout the period January 1, 1974 through May 31, 1975. The newspapers so published constitute publications which are regularly issued at average intervals not exceeding three months within the meaning of section 297A.25, subd. 1(i) of the Minnesota Statutes.

4. During the period beginning January 1, 1974 and ending May 31, 1975, plaintiff purchased paper and ink products which were used or consumed in producing such newspapers.

6. [*sic*] On August 5, 1975, plaintiff filed with the Sales and Use Tax Division of the Minnesota Department of Revenue a claim for refund of such use taxes in the amount of $874,265.04. The reasons set forth in such claim for refund were as follows:

Minnesota Statutes 297A.14 and 297A.25, subd. 1(i), as amended respectively by Article XIII, Minn. Laws 1973, c.650, sections 1 and 2, effective January 1, 1974, together provide that the cost of paper and ink products exceeding $100,000 in any calendar year, used or con-

sumed in producing a publication issued at average intervals not exceeding three months, is subject to the Minnesota use tax. Whereas all purchases of paper and ink products used for such purposes were originally exempt from use tax under the sales and use tax statute, and then were all subsequently subject to the use tax as a result of an amendment to M.S. §297A.25, subd. 1(i) made by the Minnesota legislature in 1971 (Minn. Laws 1971, c.31), under the statutory provisions as amended in 1973 and in effect since January 1, 1974, only a small number of the largest newspapers in Minnesota are subject to the use tax on purchases of paper and ink products.

It is the position of the Minneapolis Star and Tribune Company that the 1973 legislation is discriminatory and an abuse of the taxing power of the legislature, and deprives the Company of due process of law and the equal protection of the laws under the Minnesota Constitution of 1857 and the Minnesota Constitution as amended and restructured on November 5, 1974 (Art. 1, Sec. 2; Art. 1, Sec. 7; Art. 4, Sec. 33; Art. 4, Sec. 34; Art. 9; Sec. 1 for the 1857 Constitution, and Art. 1, Sec. 2; Art. 1, Sec. 7; Art. 10, Sec. 1 and Art. 12, Sec. 1 of the restructured Constitution), and also deprives the Company of due process of law and the equal protection of the laws under the 14th Amendment to the Constitution of the United States.

It is the further position of the Minneapolis Star and Tribune Company that the 1973 legislation violates the Company's right to freedom of speech and freedom of the press guaranteed to the Company by the Minnesota Constitution (Art. 1, Sec. 3 of both the 1857 Constitu-

tion and the Constitution as amended and restructured on November 5, 1974) and by the 1st and 14th Amendments to the Constitution of the United States.

7. By order of the defendant dated August 6, 1975, Donald S. Mundahl, the Director of the Sales and Use Tax Division of the Minnesota Department of Revenue, notified plaintiff of the denial of said claim for refund in its entirety.

Further Affiant Sayeth Not.

Dated: January 23, 1980.

NORTON L. ARMOUR

Subscribed and sworn to before me this 23rd day of January, 1980. W. Jean Brewer, Notary Public.

Exhibit 1

STATE OF MINNESOTA
CLAIM FOR REFUND
Sales and Use Taxes

File this claim with:
Minnesota Department of Taxation
Sales and Use Tax Division
Centennial Office Building
St. Paul, Minnesota 55145

Minneapolis Star and Tribune Company, 425 Portland Avenue, Minneapolis, Minnesota 55488. Sales & Use Tax Account Number: 8124371. Taxable Period: From January 1, 1974 to May 31, 1975. Dates of Payment: See attached schedule. Amount Claimed as Refund: $874,265.04. The time within which this claim may be filed expires under the Sales and Use Tax Law of 1967 and acts amendatory thereof, on Three years from each date of payment (which is date of filing return) listed on attached schedule. Adequate information and sup-

porting documents must be submitted with this claim to enable the Commissioner to determine the validity of the claim. Action on your claim for refund may be delayed until this information is received.

This claim should be allowed for the following reasons:

Minnesota Statutes 297A.14 and 297A.25, subd. 1(i), as amended respectively by Article XIII, Minn. Laws 1973, c.650, sections 1 and 2, effective January 1, 1974, together provide that the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication issued at average intervals not exceeding three months, is subject to the Minnesota use tax. Whereas all purchases of paper and ink products used for such purposes were originally exempt from use tax under the sales and use tax statute, and then were all subsequently subject to the use tax as a result of an amendment to M.S. §297A.25, subd. 1(i) made by the Minnesota legislature in 1971 (Minn. Laws 1971, c.31) under the statutory provisions as amended in 1973 and in effect since January 1, 1974, only a small number of the largest newspapers in Minnesota are subject to the use tax on purchases of paper and ink products.

It is the position of the Minneapolis Star and Tribune Company that the 1973 legislation is discriminatory and an abuse of the taxing power of the legislature, and deprives the Company of due process of law and the equal protection of the laws under the Minnesota Constitution of 1857 and the Minnesota Constitution as amended and restructured on November 5, 1974 (Art. 1, Sec. 2; Art. 1, Sec. 7; Art. 4, Sec. 33; Art. 4, Sec. 34; Art. 9, Sec. 1 for the 1857 Constitution, and Art. 1, Sec. 2; Art. 1, Sec. 7; Art. 10, Sec. 1 and Art. 12, Sec. 1 of the restructured Constitution), and also deprives the Company

of due process of law and the equal protection of the laws under the 14th Amendment to the Constitution of the United States.

It is the further position of the Minneapolis Star and Tribune Company that the 1973 legislation violates the Company's right to freedom of speech and freedom of the press guaranteed to the Company by the Minnesota Constitution (Art. 1, Sec. 3 of both the 1857 Constitution and the Constitution as amended and restructured on November 5, 1974) and by the 1st and 14th Amendments to the Constitution of the United States.

We (I), the undersigned, declare under the penalties of criminal liability for willfully making a false claim that this claim has been examined and to the best of our (my) knowledge and belief is true and complete.

Corporation Officers: Otto Silha, President, 8/4/75; Norton L. Armour, Secretary, 8/4/75.

Schedule of Use Tax Payments With Respect to Purchases of Newsprint and Ink, all of which Payments are Claimed as Overpayments of Tax

Month of Purchase	Tax on Newsprint Purchases	Tax on Ink Purchases	Total Tax	Date Tax Paid
Jan., 1974	34,309.16	1,270.33	35,579.49	Feb. 25, 1974
Feb., 1974	45,746.66	923.85	46,670.51	Mar. 25, 1974
Mar., 1974	46,937.15	1,067.98	48,005.13	Apr. 25, 1974
Apr., 1974	48,672.92	1,675.88	50,348.80	May 28, 1974
May, 1974	55,128.65	1,664.63	56,793.28	June 25, 1974
June, 1974	52,593.28	872.02	53,465.30	July 25, 1974
July, 1974	43,944.31	2,565.04	46,509.35	Aug. 26, 1974
Aug., 1974	46,553.23	1,176.05	47,729.28	Sept. 25, 1974
Sept., 1974	53,166.20	1,380.47	54,546.67	Oct. 25, 1974
Oct., 1974	53,022.50	1,798.30	54,820.80	Nov. 25, 1974
Nov., 1974	54,056.96	2,057.76	56,114.72	Dec. 26, 1974
Dec., 1974	55,452.14	2,568.61	58,020.75	Jan. 27, 1975
Jan., 1975	41,496.38	1,107.48	42,603.86	Feb. 25, 1975
Feb., 1975	42,922.76	1,236.26	44,159.02	Mar. 26, 1975
Mar., 1975	60,261.00	1,942.77	62,203.77	Apr. 25, 1975
Apr., 1975	54,197.64	2,049.96	56,247.60	May 28, 1975
May, 1975	58,385.21	2,061.50	60,446.71	June 25, 1975
	846,846.15	27,418.89	874,265.04	

Exhibit 2

STATE OF MINNESOTA
DEPARTMENT OF REVENUE — SALES AND USE TAX DIVISION
Centennial Office Building — St. Paul, Minnesota 55145

ORDER DETERMINING SALES AND USE TAX LIABILITY

Minneapolis Star and Tribune Company
425 Portland Avenue
Minneapolis, Minnesota 55488

Date Order Made and Filed and Notice Mailed: Aug. 6, 1975
Account Number: 8124371
Taxable Period: 1-1-74 thru 5-31-75

This is an official Order of the Commissioner of Revenue determining your Sales and Use Tax liability for the taxable period stated. This order was made and filed on the date indicated under the authority vested in the Commissioner of Revenue by Minnesota Statutes, Chapters 270 and 297A. See attached audit report or audit report previously submitted for explanation of adjustments.

If the order results in additional tax, demand is hereby made for payment of the amount shown below. Payment must be made within 30 days from the date this order was made and filed.

If the order results in a refund to you, a refund check will be prepared and mailed after the 30 day waiting period required by law.

If you disagree with this order, an appeal may be filed as provided in Minnesota Statutes 1965, Chapter 271, within 30 days to the Tax Court, Room 190, Centennial Office Building, St. Paul, Minnesota 55155.

LOUIS PLUTLER
Deputy Commissioner
of Revenue
Approved
D. S. MUNDAHL
Director
Sales and Use Tax Division

COMPUTATION OF TAX: See attached sheet for computation of tax.

Total amount due $0 Net Additional/Reduction $0

Refund due you $0

STATE OF MINNESOTA
DEPARTMENT OF REVENUE — SALES AND USE TAX DIVISION
Centennial Office Building — St. Paul, Minnesota 55145

Name: Minneapolis Star and Tribune Company
Address: 425 Portland Avenue
Minneapolis, Minnesota 55488
Account Number: 8124371
Taxable Period: 1-1-74 thru 5-31-75

COMPUTATION OF TAX

Period Ended	Additional/Reduction	Amount	Penalty	Interest	Total
1-31-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
2-28-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
3-31-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
4-30-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
5-31-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
6-30-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
7-31-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
8-31-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
9-30-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
10-31-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
11-30-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
12-31-74	Additional/Reduction	$ -0-		$ -0-	$ -0-
1-31-75	Additional/Reduction	$ -0-		$ -0-	$ -0-
2-28-75	Additional/Reduction	$ -0-		$ -0-	$ -0-
3-31-75	Additional/Reduction	$ -0-		$ -0-	$ -0-
4-30-75	Additional/Reduction	$ -0-		$ -0-	$ -0-
5-31-75	Additional/Reduction	$ -0-		$ -0-	$ -0-
		$ -0-		$ -0-	
	Net Additional/Reduction				$ -0-

STATE OF MINNESOTA
DEPARTMENT OF REVENUE
SALES AND USE TAX DIVISION

Minneapolis Star and Tribune Company
425 Portland Avenue
Minneapolis, Minnesota 55488

Account Number: 8124371
Taxable Period: 1-1-74 thru 5-31-75

Effective January 1, 1974, purchases of paper and ink products in excess of $100,000 in any calendar year, used in producing exempt publications defined in Minnesota Statutes 297A.25 Subdivision 1(i), are subject to Minnesota use tax in accordance with Minnesota Statutes 297A.14. Accordingly, your claim for refund is hereby rejected.

Because of the nature of the claim, a hearing at the administrative level has been waived.

APPENDIX M
Affidavit of Robert M. Shaw

(Caption omitted in printing)

AFFIDAVIT OF ROBERT M. SHAW

Robert M. Shaw, being duly sworn upon oath, states:

1. I am currently the Manager of The Minnesota Newspaper Association ("MNA"). MNA is a Minnesota corporation. Every publisher of a newspaper in the State of Minnesota whose newspaper is qualified as a medium of official and legal publication under the laws of the State of Minnesota is a member of MNA. During 1974 and 1975, I was the Manager of MNA.

2. Each year, MNA publishes Rate Books which, among other things, assemble and set forth factual data about paid

circulation newspapers published within the State of Minnesota. Attached hereto marked Exhibit 1 and Exhibit 2, respectively, are MNA's 1974 and 1975 Rate Books.

3. *During 1974:*

(a) There were an aggregate of 388 paid circulation newspapers published in the State of Minnesota. Of the 388, 341 (or approximately 90%) were non-daily newspapers (weekly, semi-weekly and suburban newspapers). These 341 non-daily newspapers had an aggregate circulation of 764,824 (Exhibit 1, p. 1).

(b) There were an aggregate of 29 daily newspapers, 6 metropolitan and 23 non-metropolitan. The 23 non-metropolitan daily newspapers had an aggregate circulation of 297,078 (Exhibit 1, pp. 1, 30-31). MNA's 1974 Rate Book does not contain circulation data for the 6 metropolitan daily newspapers.

(c) There were an aggregate of 17 "associate member newspapers"* which had an aggregate circulation of 335,256. None of these 17 associate member newspapers published more than two issues a week, all but two being weekly publications (Exhibit 1, pp. 1, 32-33).

4. *During 1975:*

(a) There were an aggregate of 374 paid circulation newspapers published in the State of Minnesota. Of the 374, 328 (or approximately 88%) were non-daily newspapers (weekly, semi-weekly and suburban newspapers). These 328 non-daily newspapers had an aggregate circulation of 755,636 (Exhibit 2, p. 1).

---

* An "associate member newspaper" is defined in MNA's articles of incorporation as a publisher of a newspaper which is not qualified for active membership, *i.e.*, is not qualified as a medium of official and legal publication under the laws of the State of Minnesota.

(b) There were an aggregate of 29 daily newspapers, 6 metropolitan and 23 non-metropolitan. The 23 non-metropolitan daily newspapers had an aggregate circulation of 301,787 (Exhibit 2, pp. 1, 30-31). MNA's 1975 Rate Book does not contain circulation data for the 6 metropolitan daily newspapers.

(c) There were an aggregate of 16 "associate member newspapers"** which had an aggregate circulation of 320,195. None of these 16 associate member newspapers published more than two issues a week, all but two being weekly publications (Exhibit 2, pp. 1, 32-33).

5. Based upon my experience with the publication of newspapers in the State of Minnesota, to my knowledge, during 1974 and 1975, no paid circulation newspaper published less than three times a week would have consumed sufficient amounts of newsprint (paper) and ink so as to have exceeded the $100,000 exclusion set forth in Minn. Stat. §297A.14. I am not aware of any unpaid (free) circulation newspaper published in the State of Minnesota during 1974 or 1975 that would have consumed sufficient amounts of newsprint (paper) and ink so as to have exceeded said $100,000 exclusion.

6. Attached hereto marked Exhibit 3 and Exhibit 4, respectively, are true copies of a survey compiled under my direction for Minnesota Daily Newspapers 1974 and 1975.*

** See preceding footnote for explanation.

* Exhibits 3 and 4 identify 31 newspapers, rather than the figure of 29 referred to in ¶¶3(b) and 4(b) of this Affidavit. The two additional newspapers included in Exhibits 3 and 4 are: Marshall, "Messenger-Independent," published three days a week (M-W-F) with a 1974 circulation of 6,309, and a 1975 circulation of 6,734, and Minneapolis, "Finance & Commerce," a financial daily newspaper with a 1974 circulation of 1,782, and a 1975 circulation of 1,782 (Exhibit 1, pp. 1, 16 and 30; Exhibit 2, pp. 1, 16, 30).

Exhibits 3 and 4 identify 31 newspapers published in the State of Minnesota during 1974 and 1975 and, where available, their circulation figures and use taxes paid on newsprint (paper) and ink.

7. As the data in the attached survey discloses, during 1974 the use tax on newsprint (paper) and ink was paid by only 11 publishers of daily newspapers in the State of Minnesota, and during 1975, by only 13 such publishers. Given the facts that, during 1974 and 1975, there were 388 and 374 paid circulation newspapers published in the State of Minnesota, respectively, it appears that, during those years, by virtue of the $100,000 exclusion, the use tax on newsprint (paper) and ink was imposed on only approximately 3% of all newspaper publishers in the State of Minnesota.

8. Stated in terms of the amount of such use tax paid, no publisher of a newspaper situated outside of Minneapolis, St. Paul, Duluth, Rochester, St. Cloud, Mankato, and Winona, the seven largest metropolitan centers in the State of Minnesota during the years in question (1974 and 1975), paid more than a few hundreds of dollars of such use tax, with the majority of the newspapers surveyed entirely escaping the impact of such use tax.

Further Affiant Sayeth Not.

Dated: January 23, 1980.

ROBERT M. SHAW

Subscribed and sworn to before me this 23rd day of January, 1980. John K. Steffen, Notary Public.

(NOTE: The exhibits to this Affidavit have not been reproduced. Exhibits 1 and 2 are Minnesota Newspaper Association rate books for 1974 and 1975 respectively; their relevant information is largely repeated in the Affidavit itself.

Exhibits 3 and 4 are the results of surveys on use taxes paid on newsprint and ink by MNA members during 1974 and 1975; these results are reproduced in full in the opinion of the Minnesota Supreme Court, reproduced in the Appendix to Jurisdictional Statement at A-5-7, nn.4 & 5.)

APPENDIX N

Judgment in Hennepin County District Court

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF — FOURTH JUDICIAL
HENNEPIN — DISTRICT

File No. 718018

Minneapolis Star and Tribune Company,

Plaintiff,

vs.

Commissioner of Revenue,

Defendant.

JUDGMENT

July 1, 1980

This cause having been regularly placed upon the calendar of the above named Court for the September 1979 General Term thereof, came on for hearing before the Court on the 31st day of March A.D. 1980, upon motion of Plaintiff, and the Court, after hearing the arguments of counsel and being advised in the premises, did, on the 30th day of May 1980 A.D. duly make and file its order granting said motion for judgment herein.

Now, pursuant to said order and on motion of John P. Borger, Attorney for the Plaintiff, IT IS HEREBY ADJUDGED:

1. That the motion of plaintiff for summary judgment be and the same hereby is granted in its entirety; that Minn. Stat. § 297.14, to the extent that it imposes a tax upon the consumption of paper and ink products used to produce publications, be and the same hereby is declared unconstitutional as a denial of equal protection of the laws in violation of Article I, Section 2 and Article X, Section 1 of the Minnesota Constitution and in violation of the Fourteenth Amendment to the Constitution of the United States and as an abridgement of freedom of the press in violation of Article I, Section 3 of the Minnesota Constitution and in violation of the First and Fourteenth Amendments to the Constitution of the United States.

2. That plaintiff have and recover of the defendant in the amount of One million one hundred fifty-nine thousand three hundred twenty-five and 88/100 ($1,159,325.88) Dollars, the amount ordered with interest to date hereof, with the amount of Twenty-nine and 00/100 ($29.00) Dollars, costs and disbursements as taxed and allowed herein, amounting in the whole to the sum of One million one hundred fifty-nine thousand three hundred fifty-four and 88/100 ($1,159,354.88) Dollars.

$1,159,354.88

By the Court
District Court Administrator
By L. E. TOTH
Deputy

JUDGMENT ROLL Filed July 1, 1980 Docketed 8:00 a.m. by Dist. Court Admin. L. E. Toth, Deputy.

APPENDIX O

Notice of Appeal to Minnesota Supreme Court

(Caption)

NOTICE OF APPEAL

District Court File No. 718018

To: Lawrence C. Brown, John K. Steffen and John Borger, of Faegre & Benson, 1300 Northwestern Bank Building, Minneapolis, Minnesota 55402, Attorneys for Plaintiff Minneapolis Star and Tribune Company.

PLEASE TAKE NOTICE, that the Defendant Commissioner of Revenue appeals to the Supreme Court of the State of Minnesota from the Judgment of the District Court entered on July 1, 1980, declaring that Minnesota Statutes § 297A.14 is unconstitutional to the extent that it imposes a tax upon consumption of paper and ink products used to produce publications.

Dated: July 22nd, 1980.

WARREN SPANNAUS
Attorney General
PAUL R. KEMPAINEN
Special Assistant
Attorney General
Department of Revenue
Centennial Office Building
St. Paul, Minnesota 55145
Telephone: (612) 296-3421
Attorneys for Defendant

APPENDIX P

13 Minn. Code of Agency Rules §1
Tax S & U 409 Publications (1979)

Tax S&U 409 Publications.

(a) In general. The exemption of certain gross receipts from the sales and use tax provided for by Section 297A.25, Subd. 1(i) is related to publications regularly issued at average intervals not exceeding three months.

Generally the exemption applies to gross receipts from sales of:

(1) tangible personal property (other than paper products or ink products,) fuel, electricity, gas or steam used or consumed in the production of any such publication. (See clause (c) of this regulation for rules regarding paper and ink.)

(2) such publications;

(3) any advertising contained in or with such publications.

Machinery, equipment, etc.; furniture and fixtures; fuel, electricity, gas or steam used for space heating or lighting are not exempt under this provision.

(b) Publication defined. The word "publication" encompasses only written or printed matter, such as a newspaper, magazine or other printed periodical regularly issued at average intervals not exceeding three months.

"Publication" includes any legal newspaper as defined by M. S. Chapter 331, together with any supplements or enclosures accompanying such newspaper or representing a part thereof. The term "newspaper" is limited to those publications commonly understood to be newspapers and which are printed and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general character and of general interest. The term does not include hand bills,

circulars, flyers, or the like, unless distributed as a part of a newspaper as defined. The term "publication" includes so-called "shoppers guides" distributed by a publisher, where space in such publication generally is available to advertisers for the purpose of inducing readers to purchase goods or services from such advertisers.

House organs, trade, professional and other types of magazines and journals regularly issued at average intervals not exceeding three months are included within the meaning of "publication." "Comic books" are "publications" if published serially under the same title at least once quarterly; however, comic books complete in themselves and without continuity of title and subject matter are not "publications."

The following are representative of items not included within the meaning of "publication": books, including those issued at regular or stated intervals, e.g. books sold by a book-of-the-month or other club or organization; so called "one-shot" magazines that have no literary or subject matter connection or continuity between prior or subsequent issues; price lists; hand bills; catalogs; programs; score cards; maps; sheet music; yearbooks; directories; bulletins; political newsletters issued during a campaign only, and not of a continuing nature at regular intervals not exceeding three months; loose leaf or similar personal service publications such as tax information services, labor information services, credit or financial information services (however, special reports not distributed generally are deemed personal services), law cases and briefs; realtors' descriptive listings, financial and statistical reports, unless published as a supplement or enclosure with or part of a legal newspaper.

(c) Paper and ink. Taxability of paper and ink products used in producing publications exempt under Section 297A.25, Subd. 1(i) should be determined as follows:

(1) Purchases in period 8-1-67 through 10-31-71 are exempt;

(2) Purchases in period 11-1-71 through 12-31-73 are taxable except paper and ink used as specified in (4) and (5) below;

(3) Purchases subsequent to 12-31-73 in excess of $100,000.00 in any calendar year for use on any publication are taxable except when used as specified in (4) and (5) below;

(4) Paper and ink used in printing an exempt publication of an exempt entity shall not be subject to tax whether such products are purchased by the exempt entity or by a printer who has contracted to print such publication;

(5) The tax shall not apply to paper and ink used in printing any exempt publication as herein defined, which pursuant to a sale as defined in the Sales and Use Tax Law,

(aa) is mailed or shipped to an out-of-state location of an out-of-state purchaser; or,

(bb) is mailed or shipped to an out-of-state subscriber whether the publisher is located in or outside of Minnesota.

Paper and ink purchased for use in producing any publication by a printer who is not also the publisher may be purchased by such printer exempt from sales and use tax provided he gives to the vendor an exemption certificate prescribed by the Commissioner. The publisher of such a publication will be subject to a use tax based upon the cost of such paper and ink products, unless he is exempt under (4) and (5) immediately above.

The person deemed to be producing a publication is the owner and operator who controls the format and who charges advertisers for the privilege of inserting advertisments in his publication, whether or not he prints such publication or pays another to do the printing.

(d) Gross receipts from advertising. The statute specifically provides that the gross receipts from the sale of any advertising material in a publication as defined in Section 297A.25, Subd. 1(i), shall also be exempt. It is further provided that such advertising shall be deemed to be the rendition of a service and not tangible personal property. Further, that persons or their agents engaged in the publication or sale of advertising material shall be deemed to be engaged in the rendition of a service with respect to the gross receipts realized from such news gathering or publishing activities including the sale of such advertising.

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1839

IN THE

Supreme Court of the United States

October Term, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

APPELLEE'S MOTION TO DISMISS

WARREN SPANNAUS
Attorney General
PAUL R. KEMPAINEN
Special Assistant
Attorney General
Department of Revenue
Centennial Office Building
St. Paul, Minnesota 55145
(612) 296-3421
Attorneys for Appellee

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

Whether the use tax imposed as part of Minnesota's general sales and use tax law by Minn. Stat. § 297A.14, on purchases of paper and ink exceeding $100,000 in cost which are used in the production of all "publications"[1] not taxed when sold as final products, is constitutional under the equal protection guarantees of the Fourteenth Amendment, and under the freedom of press guarantees of the First Amendment as applied to the states by the Fourteenth Amendment.

---

[1] The term 'publication" is statutorily defined by Minn. Stat. § 297A.25, subd. 1(i), as any type of publication "regularly issued at average intervals not exceeding three months" including "a legal newspaper as defined by Minn. Stat. 1965, Section 331.02".

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IN THE

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No. 81-1839

October Term, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
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vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

APPELLEE'S MOTION TO DISMISS

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Rules of the United States Supreme Court, hereby moves the Court to dismiss the appeal herein on the grounds that the questions presented are so insubstantial as not to need further argument.

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported in 314 N.W.2d 201, and reproduced in the Appendix to Jur. Stat. (A. 1 to A. 19).[2]

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable provisions of the First and Fourteenth Amendments to the United States Constitution are set forth by Appellant. (Jur. Stat., p. 2).

The actual statute under constitutional attack is the third paragraph of Minn. Stat. § 297A.14. However, to be properly understood this statute must be read in conjunction with Minn. Stat. § 297A.25, subd. 1(i). During all the tax periods directly at issue herein (from January 1, 1974 through May 31, 1975), these statutes read as follows:

> 297A.14 USING, STORING OR CONSUMING TANGIBLE PERSONAL PROPERTY; ADMISSIONS; UTILITIES. For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the

[2] Throughout this motion, the abbreviation "Jur. Stat." means the Appellant's Jurisdictional Statement; the abbreviation "A. —" is a reference to the Appendix to Jurisdictional Statement.

tax imposed by section 297A.02 was paid on said sales price.

Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

Notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section. (Emphasis added.)

297A.25 EXEMPTIONS. Subdivision 1. The following are specifically exempted from the taxes imposed by sections 297A.01 to 297A.44:

* * * * *

(i) The gross receipts from the sale of and storage, use or other consumption in Minnesota of tangible personal property (except as provided in section 297A.14) which is used or consumed in producing *any publication regularly issued at average intervals not exceeding three months,* and any such publication. *For purposes of this subsection, "publication" as used herein shall include, without limiting the foregoing, a legal newspaper as defined by Minnesota Statutes 1965, Section 331.02,* and any supplements or enclosures with or part of said newspaper; and the gross receipts of any advertising contained therein or therewith shall be exempt. For this purpose, advertising in any such publication shall be deemed to be a service and not tangible personal prop-

> erty, and persons or their agents who publish or sell such newspapers shall be deemed to be engaging in a service with respect to gross receipts realized from such news-gathering or publishing activities by them, including the sale of advertising. Machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures used in such publication and fuel, electricity, gas or steam used for space heating or lighting, are not exempt. (Emphasis added.)

In addition to the above statutes, the Minnesota Department of Revenue has issued a regulation interpreting the statutory language. This regulation, promulgated pursuant to authority granted in Minn. Stat. § 297A.29, is found in 13 Minn. Code of Agency Rules, Tax S&U 409, and is reproduced in the Appellee's Appendix hereto.

STATEMENT OF THE CASE

This is a direct appeal from the decision of the Minnesota Supreme Court upholding the constitutionality of the third paragraph of Minn. Stat. § 297A.14. The law imposes a use tax on the purchase and consumption of all paper and ink products exceeding $100,000 in annual cost and used in the production of "publications" which are not taxed when sold as final products.

The facts pertaining to the legislative history of this use tax are important to the case and are essentially undisputed. When the Minnesota legislature first enacted the general sales and use tax in 1967, a tax was laid upon the sale or use of virtually all tangible personal property in the state of Minnesota. Minn. Stat. (1967) §§ 297A.02 and 297A.14. Notable exemptions were for food, medicine and clothing. Minn. Stat.

(1967) § 297A.25, subd. 1, paras. (a), (b) and (g). In addition, sales of certain (but not all) publications, as well as the paper and ink which went into producing them, were statutorily exempted from the general sales and use tax. Minn. Stat. (1967) § 297A.25, subd. 1(i).

The category of exempt "publications" is statutorily defined to include newspapers and any other written or printed matter regularly issued at average intervals not exceeding three months. Minn. Stat. § 297A.25, subd. 1(i). Thus, besides newspapers, tax exempt "publications" would include magazines, advertising supplements, shoppers guides, house organs, trade and professional journals and serially issued comic books. *See* 13 Minn. Code of Agency Rules, Tax S&U 409B (printed in the Appellee's Appendix hereto). In addition, monthly advertising circulars printed and distributed by wholesale and retail merchants have been construed to be tax exempt "publications" within the meaning of Minn. Stat. § 297A.25, subd. 1(i). *United Hardware Distributing Company v. Commissioner of Revenue*, 284 N.W.2d 820 (Minn., 1979). However, other printed materials such as books, political campaign newsletters and law briefs were not exempted. 13 MCAR Tax S&U 409B.

"Publications" remained completely free from the sales and use tax between 1967 and 1971. In that year, however, the Minnesota legislature amended Minn. Stat. § 297A.25, subd. 1(i), to remove the exemption which had previously been granted on the purchase of paper and ink for use in printing tax exempt publications. Thereafter, all producers of tax exempt "publications" in Minnesota, large or small, rural or urban, had to pay a sales or use tax on the paper and ink which they purchased.

This tax remained in effect, unchallenged by any court proceeding, until the 1973 Minnesota legislature again amended

the law in Minn. Laws 1973, ch. 650, art. XIII, §§ 1-2. That amendment provided that the first $100,000 in purchases of paper and ink was to be excluded from the measure of taxation effective January 1, 1974.

There is no evidence whatsoever on this record to show that Minnesota's legislature, in enacting the use tax at issue herein, had any motive other than that of raising revenue; or had any sort of malicious or improper purpose towards Minnesota's large-circulation newspapers. Indeed, no such allegations were ever made by the Minneapolis Star & Tribune (hereinafter, "Star Tribune").

Appellant Star Tribune is a company engaged in the business of printing newspapers, which are included in the class of exempt "publications" under Minn. Stat. § 297A.25, subd. 1(i), and are therefore not subject to Minnesota's ordinary sales and use tax when sold as final products. Accordingly, under the statute in question, Star Tribune paid a use tax to Minnesota on its purchases of all paper and ink exceeding $100,000 in annual cost. In the nearly one and a half years from January 1, 1974 through May 31, 1975, the Star Tribune paid a total of $874,265.04 in such taxes.

The Star Tribune commenced this action in August, 1975, seeking a refund of the taxes paid. Over four years later, on January 25, 1980, Star Tribune eventually filed a motion for summary judgment. On May 30, 1980, the state district court granted summary judgment in favor of the Star Tribune declaring the use tax in question unconstitutional. (A. 49 to A. 66).

The Minnesota Commissioner of Revenue (hereinafter, "Commissioner") appealed from this ruling to the Minnesota Supreme Court, which reversed the district court's decision on December 17, 1981.

ARGUMENT

THE DECISION OF THE MINNESOTA SUPREME COURT IS PLAINLY CORRECT AND THE APPELLANT'S ARGUMENT TO THE CONTRARY FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

A.

Whether the equal protection and First Amendment questions in this case are treated separately, or together as was done by the Court below, 314 N.W.2d at 205 (A. 8), it is clear that the use tax at issue herein is, under already well-settled principles, a perfectly constitutional exertion of Minnesota's sovereign and inherently broad power of taxation.[3] Consequently, the questions presented are not the sort of important and substantial questions which would warrant the attention of this Court.

The tax in question is an integral part of Minnesota's general sales and use tax law,[4] and on its face the tax applies not just to newspapers, but to all printers of tax exempt "publications" as defined in Minn. Stat. § 297A.25, subd. 1(i). The application of the $100,000 exclusion feature of the tax is not based upon any arbitrary criteria such as circulation or sub-

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[3] As this Court said in *Madden v. Kentucky*, 309 U.S. 83, 93 (1940):

> In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary.

[4] Thus the rate of the tax cannot be raised without also raising the tax rate on all other businesses and persons subject to the sales and use tax in Minnesota. For example, the recent rate increase from 4% to 5%, cited by the Court below in footnote 1 of its opinion (A. 2), was part of a general rate increase for all sales and use taxes in Minnesota.

ject matter, but is instead available equally to all publications subject to the tax, including the Appellant Star Tribune. In fact, Star Tribune received two such $100,000 exclusions during the periods at issue herein by reason of its publishing both a morning and an evening paper. *See* 314 N.W.2d at 203, fn. 3. (A. 4). Nor is there anything in the record of this case to support a finding, or even an inference, that the Minnesota legislature adopted this tax as a means of penalizing or curtailing the publication of the Appellant's newspapers in particular, or large newspapers in general, or for that matter any publishing activity at all.

In fact the basic use tax on paper and ink, as first adopted in 1971 without the $100,000 exemption (A. 77), clearly applied to all publications, thus precluding any notion that the legislature was out to "get" big newspapers. The $100,000 exclusion complained of so strenuously by Star Tribune and by *amici* was not enacted until 1973 (A. 84). But rather than simply opposing the $100,000 exclusion, Star Tribune seeks, for obvious reasons, to have the entire tax thrown out; even though there is no question that the basic use tax itself applies equally to all tax exempt publications.

It can therefore be seen that the present case is far different from that in the leading case of *Grossjean v. American Press Co.*, 297 U.S. 233 (1936). The peculiar Louisiana statute at issue in *Grossjean* was not only a direct license tax upon publications for the privilege of engaging in the business of selling advertising, but it was also imposed solely upon the basis of size of circulation, 297 U.S. at 240, a classification which by its nature could not apply to all publications equally. Moreover, the history and setting of the Louisiana license tax clearly showed that it was nothing more than a vehicle used by that state's political "boss", Huey Long, for the deliberate and open

purpose of muzzling a selected group of opposition newspapers. As this Court stated in its *Grossjean* opinion: "[The tax] is bad because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax" enacted "with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." 297 U.S. at 250-251.

Both Star Tribune and *Amicus* Minnesota Civil Liberties Union (hereinafter, "MCLU") would like to minimize or ignore this important aspect of the *Grossjean* case.[5] However, the above quoted language makes it perfectly clear that the *Grossjean* Court was well aware of the political situation and illegitimate purpose behind the enactment of the Louisiana license tax, and that this Court viewed itself as a bulwark against such abuses of a state's taxing power.

Moreover, subsequent decisions by this Court, usually in distinguishing the *Grossjean* case, have referred to the narrowly drawn aspects and clearly abusive purpose of the Louisiana license tax. Thus, in *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946), a case which upheld the application of the Fair Labor Standards Act to a small daily newspaper even though small weekly and semiweekly newspapers were expressly exempted from the Act's provisions, this Court said:

> The *Grosjean* case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. . . . [T]he exemption of small weeklies and semi-weeklies *is not a "deliberate and calculated device" to penalize a certain group of newspapers.* (Emphasis added.)

327 U.S. at 184.

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[5] *See* Jur. Stat. at 11-12; and Br. of *Amicus* MCLU at 27-29.

In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), a case upholding against First Amendment attack a municipal human relations ordinance which prohibited newspapers from carrying sex designated help wanted ads, this Court first recognized the *Grossjean* case as one of the leading authorities in the area, 413 U.S. at 382-383, but then distinguished it by saying quite simply:

> [N]o suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press.

413 U.S. at 383.

See also Houchins v. KQED, Inc., 438 U.S. 1 (1978), where this Court reiterated that:

> *Grosjean* involved a challenge to a state tax on advertising revenues of newspapers, *the "plain purpose" of which was to penalize the publishers and curtail the publication of a selected group of newspapers.* (Emphasis added.)

438 U.S. at 9.

Other state courts besides the Minnesota Supreme Court have stated their views that the *Grossjean* case cannot be read in isolation from its historical setting. *See Lee Enterprises v. Iowa State Tax Commission*, 162 N.W.2d 730, 755 (Iowa, 1968); and *Giragi v. Moore*, 49 Ariz. 74, 85-86, 64 P.2d 819, 823 (Lockwood, J., concurring), *appeal dismissed*, 301 U.S. 670 (1937).

In direct contrast to the situation in *Grossjean*, is the case at hand, where there is absolutely no evidence to show that Minnesota's use tax on paper and ink was passed to single out a particular newspaper or group of newspapers for unconstitu-

tional muzzling.[6] On the contrary, the purpose of the law was to raise revenues under a general system of taxation.

As the Minnesota Supreme Court correctly stated in its opinion below:

> The history and setting of section 297A.14, reviewed at the start of this opinion, reveal that it is not a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers distributed by publishers such as Star Tribune. It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota. Unlike the type of tax found to be unconstitutional in *Grosjean*, sales and use taxes are now commonplace and readily accepted. [citations omitted.] . . . This type of taxation has no "long history of hostile misuse against the freedom of the press."

314 N.W.2d at 207 (A. 12).

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[6] Indeed, if that was its purpose the use tax in question has been singularly unsuccessful in achieving it. Anyone familiar with Minnesota society knows that the newspapers of this state, especially the large dailies, have been vigorously independent in their political reporting; and the Appellant has neither suggested nor presented any evidence to support a conclusion that that tradition has in any way been diminished over the almost eleven years since the use tax on paper and ink was first enacted.

As for the completely unsupported inference in *Amicus* MCLU's brief (pp. 2-3) to the effect that the recent merging of the afternoon Star with the morning Tribune was somehow related to the passage over ten years ago of the use tax herein, it is enough to quote the MCLU's own disclaimer on p. 11 of its brief:

> "It would be too much to claim that the 'big newspaper tax' killed the Star, or was intended to."

We should think so. Especially in view of the fact that the Star was still a viable profit-making operation when its management voluntarily decided to merge it with the Tribune. *See* Minneapolis Star, March 24, 1982, p. 5A, col. 2.

The "history and setting" referred to above by the Minnesota Supreme Court is open for anyone to see, and it amply justifies the present use tax as a general revenue raising measure.

In 1971 the Minnesota legislature had before it a comprehensive proposal for reforming and redistributing the overall state and local tax burden. Simply stated, the plan called ". . . for the state to take over a large share of the school-financing burden from local districts, mandating a huge increase in the state budget." *See Minnesota: A State That Works*, TIME, August 13, 1973, pp. 24-35 at 35. The issue was a major one in Minnesota at that time, so much so that the question could not be resolved during the legislature's regular session that year.

Instead, the legislature had to be called into an extra session, the result of which was the passage of Minn. Laws 1971, Ex. Sess., c. 31. This law was entitled: "An act relating to the organization, operation and financing of state and local government; appropriating money therefor; . . . ." A reading of that 1971 law reveals on its face that among the objects it sought to obtain was the large scale reduction of local property tax burdens, a corresponding increase in state aids to local governments and school districts to make up the difference, and a large scale increase in state-wide tax revenues to finance the program.

In order to raise new revenue to fund this new program the overall sales and use tax rate was raised from three to four percent (Minn. Laws 1971, Ex. Sess., c. 31, art I, § 2) (A. 73-74), and some sales tax exemptions which had previously been granted were repealed. One of these repealers did nothing more than eliminate the previous exemption for paper and ink products used or consumed in the production of otherwise ex-

empt publications. Minn. Laws 1971, Ex. Sess., c. 31, art I, § 5. (A. 77).

Thus, in its search for additional state-wide revenue the 1971 legislature simply imposed a use tax upon a class of previously untaxed property for the perfectly valid purpose of funding the state's new property tax reduction and local educational aid program.

The importance of this tax reform program was widely heralded, and it became popularly known as "The Minnesota Miracle" in providing equal educational opportunity to all Minnesotans. As described in *Minnesota: A State That Works*, TIME, August 13, 1973 at p. 35:

> With such state revenues [Minnesota] increased state aid for education from 43% to 63% in the first year, and now to 70%, thereby decreasing the real estate tax burden by an average of 11.5%.
>
> It was a major piece of social legislation, for within a six-year period, it will virtually equalize the per-pupil spending for education throughout the state and thus go a long way toward equalizing education in the cities, suburbs and rural areas.

Against this clear evidence of the basic use tax being enacted as part of an overall tax reform measure, and for a proper legislative purpose, there is absolutely nothing on record to support a conclusion that this is a forbidden "tax on knowledge" as claimed by the Star Tribune. (Jur. Stat. at 10-14).

Instead, this tax obviously comes within that class of general laws which this Court has on numerous occasions upheld against claims by the media of special privilege under the First Amendment. This Court in *Grosjean* expressly reaffirmed the right of the states to impose ordinary forms of non-

discriminatory taxation upon newspapers and other publishers, saying:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.

297 U.S. at 250.

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), a case which held that reporters have no First Amendment right to refuse to testify before state or federal grand juries regarding their confidential news sources, this Court said:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws."

408 U.S. at 682-683.

Accord, Pittsburgh Press Company, supra, 413 U.S. at 382-383. *Cf. Zurcher v. Standard Daily*, 436 U.S. 547, 565-566 (1978) (First Amendment provides to newspapers no greater freedom from proper search warrants than that of the general public); *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978) (First Amendment grants the press no right to information about a trial superior to that of the general public); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (The press has no First Amendment right of access to prisons beyond that afforded the general public).

In particular, the Minnesota Supreme Court reviewed the string of lower court decisions following in the wake of *Grossjean*, 314 N.W.2d at 206-207 (A. 10 to A. 12), and concluded that the Minnesota use tax at issue herein fell within the more numerous class of general non-discriminatory taxes which, although clearly imposed on the press, have nevertheless been upheld over the years against First Amendment challenges. *See, e.g. Giragi v. Moore, supra*; *Arizona Pub. Co. v. O'Neil*, 22 F.Supp. 117 (D.C., 1938), *aff'd* 304 U.S. 543; *Rueben H. Donnelley Corp. v. City of Bellevue*, 283 Ky. 152, 140 S.W.2d 1024 (1940); *City of Corona v. Corona Daily Independent*, 115 Cal. App.2d 382, 252 P.2d 56 (1953); *Territory of Alaska v. Journal Printing Co.*, 135 F.Supp. 169, 15 Alaska 676 (1955); *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368 (1947), *cert. denied* 332 U.S. 749 (1947); *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170 (1958); and *Lee Enterprises, Inc. v. Iowa State Tax Commission, supra.*

All of these cases are in accord with the principles set forth by this Court in *Grossjean, supra*; and so too is the decision of the Minnesota Supreme Court below. Nothing in the Minnesota Supreme Court's decision serves to diminish *Grossjean* as the primary bulwark protecting the press against "deliberate and calculated device[s] in the guise of a tax," enacted "with the plain purpose of penalizing . . . publishers and curtailing . . . circulation". *Grossjean*, 297 U.S. at 250-251. Since Minnesota's use tax on paper and ink is clearly not such a proscribed form of taxation, it follows that Star Tribune's First Amendment claim based upon *Grossjean* is without merit and should be dismissed.

B.

Similarly, Star Tribune's equal protection claims are also without merit. The Minnesota Supreme Court expressly adopted and correctly applied the strict scrutiny standard of review for this case, 314 N.W.2d at 205 (A. 8); both as to the alleged discrimination between tax exempt "publications" and other industrial users of paper and ink, and as to the alleged discrimination between publishers who purchase over $100,000 in paper and ink annually, and those who purchase less.

But before discussing the correctness of this result, we wish to reiterate our belief that in applying the strict scrutiny standard of review the Minnesota Supreme Court went further than it was required to go. As the Appellee Commissioner vigorously argued below (*See* A. 28 to A. 34), the nature of this use tax as a part of Minnesota's general system of non-discriminatory sales and use taxation means that the strict scrutiny standard simply should not apply, and that instead the traditional "any rational basis" test is the correct standard for review.[7]

Many formulations, sometimes using different language, have been set forth over the years by this Court on the question of when the strict scrutiny standard is to be applied in equal protection cases. But two of the most recent decisions

[7] It was solely in the context of arguing against adoption of the strict scrutiny standard that Appellee's counsel made the statement quoted by Star Tribune in its Jur. Stat. at 8-9 to the effect that "it would be difficult to uphold this particular statute under the strict scrutiny standard of review", after which Appellee's counsel immediately added "It would not be impossible." (A. 34). At oral argument below Appellee's counsel clearly established the context of these remarks when he said "our primary position on the strict scrutiny issue is that strict scrutiny simply doesn't apply here." (A. 28 to A. 29).

have succincily stated the test in clear terms, *Massachussetts Board of Retirement v. Murgia*, 427 U.S. 311 (1976); and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). In *Murgia*, 427 U.S. at 312, this Court stated:

> San Antonio School District v. Rodriguez, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification *only* when the classification *impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.* (Emphasis added).

Since in the present case there is no allegation that a "suspect class" is adversely affected by the use tax on paper and ink, it follows that strict scrutiny can only be invoked if it is shown that the use tax "impermissibly interferes with the exercise of a fundamental right." *Id.*

The record herein fails to establish that the present use tax constitutes any sort of impermissible interference with the freedom of the press. As part of Minnesota's general sales and use tax law, it is but one of many taxes which happen to affect newspapers in some way, *see e.g.*, the income and property taxes which Star Tribune concedes to be proper. However, merely because a general law "affects" a First Amendment protected activity should not, and does not, mean that that law must in all cases be subjected to the strict scrutiny standard of constitutional review. Under *Murgia*, *supra*, the "strict scrutiny" test is invoked only when the law in question "impermissibly interferes" with a fundamental right.

Thus, in *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946), this Court was directly faced with an "equal protection" issue of alleged unconstitutional discrimination in the

Fair Labor Standards Act, between small daily newspapers (who were held to be subject to the Act) and small weekly and semi-weekly newspapers (who were statutorily exempt under the Act).[8] In upholding the constitutionality of this Act, this Court did not find it necessary to apply any sort of strict scrutiny standard of review, but in effect applied an "any rational basis" test. 327 U.S. at 184. Likewise, in *Hadwen, Inc. v. Vermont Dept. of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed* 451 U.S. 977 (1981), the Vermont Supreme Court applied the "any rational basis" test in upholding that state's use tax on ink, newsprint and other supplies used in the publication of a weekly free "Pennysaver", (which the Court held to be a newspaper) against equal protection attack.

Applying the above authorities to the present case, it can be seen that the use tax in question does not interfere at all with the exercise of First Amendment rights, much less impermissibly so. The law is merely part of a general tax upon the sales and use of all tangible personal property in this state and is not subject to strict scrutiny by this Court.

Nevertheless, we agree with the Court below that the use tax is constitutional under any standard of review. Indeed, the fact that the Minnesota Supreme Court went beyond the "any rational basis" standard to apply the higher standard of strict scrutiny, and still found the use tax in issue to be perfectly constitutional, is yet further evidence that the questions presented in this appeal are not substantial enough to warrant the attention of this Court.

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[8] Because the statute in *Mabee* was a federal law, the issue was raised under the Fifth Amendment rather than the Fourteenth Amendment. However, the standards of review under both Amendments are now recognized as virtually identical. *See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

C.

Turning first to the question of equal protection as between "publications" and other industrial users of paper and ink, there was an obvious and clear difference between paper and ink used in printing tax exempt "publications", and paper and ink used in the industrial production of non-exempt products. In the former situation the end product (e.g., a regularly issued publication) was statutorily exempt from sales or use tax upon its retail sale to the final consumer under Minn. Stat. (1967) § 297A.25, subd. 1(i). In the latter situation, however, the end product (e.g., pre-printed stationery, maps, books, etc.) was *not* exempt upon its retail sale to the final consumer. The paper and ink going into such products was therefore eventually taxed at the point of retail sale. As the Minnesota Supreme Court correctly stated in its opinion below:

> Nonpublishers pay no use tax on consumption of paper and ink, but the goods they produce are subject to retail sales tax. Theoretically, the value of the paper and ink is reflected in the retail price that forms the basis of the sales tax.
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> * * * * *
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> By exempting industrial users from the use tax, the legislature was acting in accordance with its general scheme to exempt component parts from the use tax when the completed product is subject to sales tax. *Standard Packaging Corp. v. Commissioner of Revenue*, 288 N.W. 2d 234, 237-38 (Minn., 1979).

314 N.W.2d at 207-208 (A. 13 to A. 14).

It can therefore be seen that, unlike the usual industrial manufacturing situation, paper and ink used for tax exempt

publications escaped sales and use taxation entirely under the statutory scheme in effect between 1967 and 1971. All the tax in question did was to remove this legislatively granted exemption. The sole reason for doing so was to raise revenue by insuring that the cost of such paper and ink would be subjected to taxation at least once during the manufacturing process. This plan of taxation would put the paper and ink used for tax exempt publications on roughly the same plane with the paper and ink used by ordinary industrial manufacturers, the cost of which is eventually subjected to sales and use taxation when the final product is sold at retail.

We fail to see how this scheme can be a greater burden on "publications" than is the imposition of a sales tax upon the nonpublisher's sale of his final product. In fact, the burden is even smaller in the case of tax exempt "publications" because the raw materials going into the product (i.e., paper and ink) are almost invariably of less value than the final product itself, therefore resulting in a lower overall tax burden.

It is immaterial that the Star Tribune pays the use tax as an out-of-pocket expense, while other industrial users of paper and ink simply collect the sales tax from the ultimate consumer. As the Minnesota Supreme Court correctly noted below:

> In all cases, producers of goods are free to assume the burden of any tax or pass some part of it on to consumers in the form of higher retail prices. *See Developments*, 75 Harv. L. Rev. at 994.

314 N.W.2d at 208 (A. 14).

In fact, the tax burden on the Star Tribune under the present use tax is less than that which would result were it truly taxed like other industrial users of paper and ink, i.e.,

by taxing the ultimate sale of its final products. That the Minnesota legislature could impose its sales tax on publications is beyond question in light of the fact that Minnesota's sales tax is a general excise tax upon the sale of all tangible personal property in this state. Minn. Stat. §§ 297A.02 and 297A.01, subds. 3 and 4. Since newspapers are clearly tangible personal property, they are as much subject to a general, non-discriminatory tax upon their sale as is any other item of tangible personal property. Just as publishers of newspapers are subject to other forms of general taxation and regulation, *see Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-133 (1967), so too would they be subject to a general sales tax upon the sale of all tangible personal property.[9]

Star Tribune's assertion to the contrary (Jur. Stat. at 19-20), is clearly erroneous. Nothing in the First Amendment or in the cases cited by Star Tribune mandates that newspapers be exempt from general forms of taxation, any more than churches are constitutionally exempted from taxation by the First Amendment. Exemptions from general taxes for both newspapers and churches are, like all tax exemptions, purely matters of legislative grace insofar as the First Amendment is concerned. In fact, in the case of churches it has been expressly held that there is no First Amendment right to tax exemption on religious grounds. *Parker v. Commissioner of Internal Revenue*, 365 F.2d 792 (8th Cir., 1966), *cert. den.* 385 U.S. 1026; *Universal Liberty in Christ Temple v. U.S.*, 36 AFTR2d 75-5309, 75-5313 (U.S.D.C. Mich., 1975); cf. *Bob Jones University v. Simon*, 416 U.S. 725, 749 (1974).

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[9] It is noteworthy that the sale of books (which are just as much the object of First Amendment protection as are newspapers) have always been subject to Minnesota's sales tax without, to our knowledge, any constitutional challenge in the courts. *See*, 13 MCAR Tax S&U 409B.

Because there is nothing in either the First or Fourteenth Amendments which would prevent the Minnesota legislature from imposing a non-discriminatory sales tax on newspapers, we fail to see how the imposition of a use tax on only their purchases of paper and ink, which is less than the sales tax on final products of other industrial users of paper and ink, is unconstitutional. Even under the strict scrutiny standard of review there is no impermissible discrimination when the burden imposed upon one class (in this case publishers) is actually less than the burden imposed upon other classes.

But Star Tribune complains that there still exist other industrial users of paper and ink (*e.g.*, printers of milk cartons and school textbooks) whose final products are exempt from sales tax, but who are not subjected to the use tax on paper and ink. (Jur. Stat. at 23). The simple answer to this is that the Minnesota legislature is not constitutionally constrained to exempt all items of property from taxation, or none at all. State legislatures have inherently broad powers to create classifications and grant exemptions for the purpose of "fitting tax programs to local needs in order to achieve an equitable distribution of the tax burden". *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Thus Minnesota is free to judge that such items as food (and the packaging for food), as well as school textbooks, are entitled to remain totally exempt from its general sales and use tax.

D.

The $100,000 exclusion added to the tax in 1973 is also a perfectly constitutional exercise of the state's taxing power. In the first place, there can hardly be a violation of equal protection when a rule of law is applied equally and without discrimination to all who come within its scope.

It would seem axiomatic that equal protection can only be violated if there is some statutory classification which operates in a discriminatory manner. As this Court said in *State of Louisiana v. Resweber*, 329 U.S. 459 (1947):

> So long as the law applied to all alike, the requirements of equal protection are met.

329 U.S. at 465.

In the present case, the $100,000 exclusion applies equally to all producers of tax exempt publications. In effect it is a form of tax credit which is generally applicable to all who come within the act.[10] Each producer of a publication, large or small, is entitled to subtract the same $100,000 from its cost of purchasing paper and ink before calculating the amount of use tax due. In fact, Star Tribune received two such $100,000 exclusions.

Yet, as is the case with all general rules of taxation, it is possible that its application to different persons will result in different tax liabilities. But this does not, in itself, make the general rule unconstitutional, because the Fourteenth Amendment guarantees only equal laws, not necessarily equal results. *Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979). *See Mouledoux v. Maestri*, 197 La. 525, 2 So.2d 11, 21 (1941) (sales and use tax graduated by size of purchase upheld because the cut-off points applied equally to all).

Even if it were conceded, *arguendo*, that the $100,000 exclusion is a discriminatory classification as between large and

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[10] In this regard it is not unlike the political contribution tax credit of $50 ($100 in the case of joint returns) allowed against the federal income tax by 26 U.S.C. § 41. Small contributions of $50 or less get full advantage of the tax break, whereas larger contributors get the same advantage up to $50, but thereafter get no tax benefit.

small publications, the law would still be constitutional under either the "any rational basis" or the "strict scrutiny" standard of review.

As we have already noted, the $100,000 exclusion is not aimed at "hurting" large publishers at all, for the simple reason that its provisions are as equally beneficial to large publishers as they are to small publishers. Were the $100,000 exclusion removed, only a relatively minor tax would be collected from each of numerous small publishers but significantly increased taxes would be collected from large publishers.

Needless to say, this is not the result sought by Star Tribune. Instead, Appellant seeks to have the entire use tax declared unconstitutional, with or without the $100,000 exclusion. To the extent that this is the real object of Star Tribune's lawsuit, it becomes evident that the attack it makes on the constitutionality of the $100,000 exclusion is really a smoke screen to mask the real issue, which is the constitutionality of the basic use tax on paper and ink.

The $100,000 exclusion is nothing more than a legitimate and reasonable device which the legislature had the power to adopt as part of the basic use tax for the purpose of equitably adjusting the tax burden. *Madden v. Kentucky, supra,* 309 U.S. at 88. The Minnesota Supreme Court recognized this reality when it first discussed the constitutionality of the basic use tax as a whole. *See* Part II of the opinion below, 314 N.W.2d at 205-208 (A. 8 to A. 14). It did not deal with the $100,000 exclusion until Part III of its opinion, where the Court set forth the subordinate relationship of the $100,000 exclusion, and then held that the exclusion was not contrary to Minnesota's overall compelling state interest of raising revenue within the context of a fair tax system:

> [T]he use tax is constitutionally justified, as we said in Part II of this opinion, as a revenue-raising measure. The $100,000 exemption itself is justified if it is an integral part of the sales and use tax system.
>
> * * * * *
>
> [I]t is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order to do so, the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state,

314 N.W.2d at 209 (A. 17 to A. 18).

In other words, the Minnesota Supreme Court recognized that in order to accomplish its purpose of raising revenue, the state is not bound to tax all possible sources of revenue, or none at all. *Cf. Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

It is well settled that if there are reasonable and legitimate grounds for making distinctions between taxpayers the legislature is free to do so, *Madden v. Kentucky, supra*, certainly under the "any rational basis" standard; and also in the context of this case under the "strict scrutiny standard". This is because the state has, as a corollary to its compelling interest of raising revenue, an equally compelling interest in seeing that its revenue is raised under an equitable system of taxation.

The reasons behind the $100,000 exclusion fit within this constitutionally acceptable category. One reason was expressly mentioned by the Court below:

> [A] use tax exemption for the first $100,000 of paper and ink consumed may be justified as a legislative policy

> to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered).

314 N.W.2d at 209 (A. 17).

Another difference between large and small business operations is that larger businesses, by their nature, impose more social costs than do small business operations. The state would therefore have a reasonable and natural basis for imposing upon large business a greater tax burden to defray such costs.

Moreover, it is worth noting that large publishers are much more likely to be located in highly populated metropolitan areas which provide both high circulation and advertising revenue possibilities. On the other hand, small newspapers are likely to be located in predominately rural areas where circulation and advertising possibilities are clearly more limited. Because these two groups serve two different kinds of constituencies they are not in direct competition with each other for the available circulation and advertising dollar, and giving a tax break to one will not result in its gaining an unfair business advantage over the other.

As for Star Tribune's claim that this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), compels a finding that the $100,000 exclusion is unconstitutional (Jur. Stat. at 14-16), we believe the Minnesota Supreme Court more than adequately answered that contention when it said below:

> *Neither the purpose nor the effect of section 297A.14 is to enhance the voice of one newspaper relative to another newspaper.* The expenditure limitations found unconstitutional in *Buckley* were restrictions upon the total amount of money that could be spent by persons during a campaign. Such limitations were "substantial

> rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. *By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount.* The use tax may theoretically reduce the amount of money they may spend by reducing available capital. But all taxes do as much. There is nothing special about this form of taxation which elevates to a constitutional plane these theoretical effects on "quantity" or "diversity." (Emphasis added.)

314 N.W.2d at 210 (A. 18 to A. 19).

Moreover, as we have mentioned earlier, the $100,000 exclusion herein is far more comparable to the $50/$100 political contribution credit found in the Internal Revenue Code than it is to the contribution limits found in *Buckley v. Valeo. See* fn. 10, *supra.*

Likewise, Star Tribune's contention that *Stewart Dry Goods v. Lewis,* 294 U.S. 550 (1935) is applicable herein was also more than adequately answered by the Minnesota Supreme Court below, which recognized that *Stewart Dry Goods* dealt with a totally different kind of tax than the one at issue herein. In *Stewart Dry Goods,* the tax in question was a "gross sales tax" on the privilege of doing business as a retailer, *i.e.* it was a tax on total gross receipts without taking into account either expenses or profitability. It was therefore clear that the justification for the graduated nature of tax (*e.g.* the value of the privilege increasing with volume of sales) did not bear any relation with the actual tax. The present use tax however is not based upon "privilege" or "gross receipts". It is simply a tax upon the act of purchasing and using tangible personal property, in the same manner as is the rest of Minnesota's general sales and use tax. As the Court below said:

> We do not find the reasoning of *Stewart Dry Goods* and *National Tea* persuasive in the context of this case. Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets. Rather, the use tax is constitutionally justified, . . . , as a revenue-raising measure.

314 N.W.2d at 209 (A. 17).

E.

It is evident from the foregoing that no new questions are being presented in this appeal, for everyone agrees that *Grossjean v. American Press, supra*, is the bellwether case on the constitutional limits of a state's power to tax newspapers. The Minnesota Supreme Court recognized that fact below and, after carefully analyzing both *Grossjean* and its progeny, came to the correct conclusion that the present use tax is well within those constitutional bounds.

Since there are no new questions of law herein, it follows that no new law will be created by a full review and decision of this appeal beyond what this Court has already laid down in *Grossjean*, which still stands against any attempt by the states to muzzle or punish the exercise of First Amendment rights. But, as we have previously explained, there is in this case absolutely no suggestion or evidence that such abuses have resulted, or were intended to result, from the enactment of the present use tax on paper and ink.

Nothing in the Minnesota Supreme Court's opinion can in any way be read to weaken this Court's decision in *Grossjean*. When and if some other state ever really attempts to use its taxing power to muzzle or punish the press, the courts in gen-

eral and this Court in particular have ample ammunition in *Grossjean* to stop the assault.

CONCLUSION

For the reasons stated herein, the appeal should be dismissed for failure to present a substantial federal question.

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APPELLEE'S APPENDIX

13 Minn. Code of Agency Rules, Tax S&U 409

Publications

A. *In general.* The exemption of certain gross receipts from the sales and use tax provided for by Section 297A.25, Subd. 1(i) is related to publications regularly issued at average intervals not exceeding three months.

Generally the exemption applies to gross receipts from sales of:

1. tangible personal property (other than paper products or ink products), fuel, electricity, gas or steam used or consumed in the production of any such publication. (See clause C. of this regulation for rules regarding paper and ink.)
2. such publications;
3. any advertising contained in or with such publications.

Machinery, equipment, etc.; furniture and fixtures; fuel, electricity, gas or steam used for space heating or lighting are not exempt under this provision.

B. *Publication defined.* The word "publication" encompasses only written or printed matter, such as a newspaper, magazine or other printed periodical regularly issued at average intervals not exceeding three months.

"Publication" includes any legal newspaper as defined by M. S. Chapter 331, together with any supplements or enclosures accompanying such newspaper or representing a part thereof. The term "newspaper" is limited to those publications commonly understood to be newspapers and which are printed and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general character

and of general interest. The term does not include hand bills, circulars, flyers, or the like, unless distributed as a part of a newspaper as defined. The term "publication" includes so-called "shoppers guides" distributed by a publisher, where space in such publication generally is available to advertisers for the purpose of inducing readers to purchase goods or services from such advertisers.

House organs, trade, professional and other types of magazines and journals regularly issued at average intervals not exceeding three months are included within the meaning of "publication." "Comic books" are "publications" if published serially under the same title at least once quarterly; however, comic books complete in themselves and without continuity of title and subject matter are not "publications."

The following are representative of items not included within the meaning of "publication": books, including those issued at regular or stated intervals, e.g. books sold by a book-of-the-month or other club or organizations; so called "one-shot" magazines that have no literary or subject matter connection or continuity between prior or subsequent issues' price lists; hand bills; catalogs; programs; score cards; maps; sheet music; yearbooks; directories; bulletins; political newsletters issued during a campaign only, and not of a continuing nature at regular intervals not exceeding three months; loose leaf or similar personal service publications such as tax information services, labor information services, credit or financial information services (however, special reports not distributed generally are deemed personal services), law cases and briefs; realtors' descriptive listings, financial and statistical reports, unless published as a supplement or enclosure with or part of a legal newspaper.

C. *Paper and ink.* Taxability of paper and ink products used in producing publications exempt under Section 297A.25, Subd. 1(i) should be determined as follows:

1. Purchases in period 8-1-67 through 10-31-71 are exempt;

2. Purchases in period 11-1-71 through 12-31-73 are taxable except paper and ink used as specified in 4. and 5. below;

3. Purchases subsequent to 12-31-73 in excess of $100,000.00 in any calendar year for use on any publication are taxable except when used as specified in 4. and 5. below;

4. Paper and ink used in printing an exempt publication of any exempt entity shall not be subject to tax whether such products are purchased by the exempt entity or by a printer who has contracted to print such publication;

5. The tax shall not apply to paper and ink used in printing any exempt publication as herein defined, which pursuant to a sale as defined in the Sales and Use Tax Law,

a. is mailed or shipped to an out-of-state location of an out-of-state purchaser; or,

b. is mailed or shipped to an out-of-state subscriber whether the publisher is located in or outside of Minnesota.

Paper and ink purchased for use in producing any publication by a printer who is not also the publisher may be purchased by such printer exempt from sales and use tax provided he gives to the vendor an exemption certificate prescribed by the Commissioner. The publisher of such a publication will

be subject to a use tax based upon the cost of such paper and ink products, unless he is exempt under 4. and 5. immediately above.

The person deemed to be producing a publication is the owner and operator who controls the format and who charges advertisers for the privilege of inserting advertisements in his publication, whether or not he prints such publication or pays another to do the printing.

D. *Gross receipts from advertising.* The statute specifically provides that the gross receipts from the sale of any advertising material in a publication as defined in Section 297A.-25, Subd. 1(i), shall also be exempt. It is further provided that such advertising shall be deemed to be the rendition of a service and not tangible personal property. Further, that persons or their agents engaged in the publication or sale of advertising material shall be deemed to be engaged in the rendition of a service with respect to the gross receipts realized from such news gathering or publishing activities including the sale of such advertising.

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Office - Supreme Court, U.S.
FILED
JUN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1839

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October Term 1981

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Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

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The consistent approach of Appellee's Motion to Dismiss ("Motion") is to attempt to foreclose constitutional analysis by the use of phrases which assume the very conclusions which the State seeks. At base, the State's position is that it is free to ignore the discriminatory effect of successive tax classifications as long as each classification appears neutral on its face: *i.e.*, 1) sales tax exemptions for publications; 2) imposition of "compensating" use tax on paper and ink used by publications which are exempt from the sales tax; and 3) exclusion of the first $100,000 of paper and ink per publication; with the result that only large Minnesota publishers

are subject to a substantial tax burden which smaller and foreign publishers escape entirely.

Contrary to this Court's recent reminder that "regulation of First Amendment rights is *always* subject to exacting judicial review," *Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4072 (1981) (emphasis added), the State contends that the challenged use tax should not be subject to strict scrutiny because it is "a part of Minnesota's general system of nondiscriminatory sales and use taxation." (Motion at 16.)[1] The State might argue with as much logic that statutes forbidding publication of the names of rape victims disclosed in public records or of juvenile offenders are exempt from judicial review as "part of a general criminal code" or that libel laws are similarly immune from constitutional analysis as "part of the State's general system of tort law." This Court has consistently shown itself to be more sensitive to constitutional questions. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (names of rape victims); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (names of juvenile offenders); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel).[2]

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[1] In arguing against a strict scrutiny standard in this case, the State correctly notes (Motion at 18) that the Vermont Supreme Court applied a less rigorous standard in upholding a use tax on ink, newsprint and other supplies used in the publication of free newspapers. *Hadwen, Inc. v. Vermont Dept. of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed* 451 U.S. 977 (1981). However, judging from the Jurisdictional Statement submitted to the Court by Hadwen, Inc., it appears that the publisher in that case itself proposed the "rational basis" standard of review and never invoked strict or exacting scrutiny. Such litigation strategy may bind Hadwen as the law of the case, but it hardly constitutes precedent applicable in the present appeal.

[2] Although the State seeks to use labels to avoid judicial review of the challenged use tax, it implies that Star Tribune is less than serious about its constitutional objections to the tax because of the timing of the commencement of this action and of the filing of the summary judgment motion. (*Cf.* Motion at 5, 6.) Nothing could be farther from the truth. Ever since the 1971 enactment of the

The State seeks to justify the challenged use tax by describing it as "an integral part of Minnesota's general sales and use tax law" (Motion at 7) and by distinguishing the "narrowly drawn aspects" of the Louisiana tax at issue in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (Motion at 9). At the same time, it defends the peculiarities of the challenged tax by asserting: "The Minnesota legislature is not constitutionally constrained to exempt all items of property from taxation, or none at all." (Motion at 22.) If the State's broad position is accepted, it would be free to "fine tune" its taxes without restriction and without regard for any adverse impact of the taxes on constitutional rights.

Sales and use taxes are particularly susceptible to discriminatory adjustment. General revenue-raising measures such as income taxes, property taxes, and gasoline taxes can legitimately be refined through classifications and exemptions, but such taxes cannot legitimately be directed specifically against a particular class of users, such as publishers, because the discrimination becomes so blatant that the classification requires dismissal out of hand when it affects constitutional interests. At oral argument before the Minnesota Supreme Court, Justice Peterson posited a gasoline excise tax "made applicable only to publication companies that used in excess of a certain number of gallons of gasoline." (A-30.) The State's counsel conceded, in effect, that such a tax would be patently unconstitutional. (*Id.*) ("Well, in that case, Your Honor, there would be no question that—you know, that would be aimed precisely at, you know, the publication in-

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tax, Star Tribune has raised the constitutional arguments and has sought relief from other branches of government. In fact, Governors Wendell Anderson, Rudolph G. Perpich and Albert H. Quie have supported and encouraged efforts to repeal the challenged use tax. Bills to repeal the tax were introduced in each legislative session.

dustry, and one of our positions in this case is that this tax is not aimed precisely at the publication industry.") Unlike income, property and gasoline taxes, which are broad taxes, sales and use taxes by their very nature classify and exempt according to particular uses; it is difficult to conceive of a sales and use tax classification expressly directed at newspapers which the State would not attempt to justify, under the Minnesota Supreme Court's rationale, as "part of a general system of sales and use taxation." There then apparently would be no limit to the State's power to tax newspapers.

Indeed, the "fine tuning" of the $100,000 exemption allows the State to change the effective rate of use tax paid by publications (*see* Jurisdictional Statement at 16-17 and A-90-92), notwithstanding its present assertion that it could not change the rate of the challenged tax without also changing the tax rate on all other businesses and persons subject to Minnesota sales and use taxes (Motion at 7 n.4). Far from being a "smoke screen" (Motion at 24), Star Tribune's challenge to the $100,000 exemption emphasizes the potential for abuse which can be achieved through discriminatory adjustment of the sales and use taxes. Other abuses are readily conceived:

> Could the per-publication exemption be increased to the point that only one publisher, rather than a dozen publishers, paid any tax at all?
>
> Instead of exempting sales of publications published quarterly or more frequently, could the State choose to exempt only publications published four times per week or less frequently (just as is now done through the $100,000 exemption in the use tax)?
>
> Could it tax only newspapers in cities with large populations, as the State implies (Motion at 26)?

Could it, despite *Grosjean*, explicitly tax sales only of publications with circulations above a certain level, on the grounds of defraying the "social costs" of large businesses or of giving favorable tax treatment to small enterprises (*cf.* Motion at 26)?

Could the State tax the sale of publications and all other tangible personal property, and then grant successive exemptions until eventually only publications were subject to the "general" sales tax?

And, in the context of this Court's deliberations on noting probable jurisdiction of the present appeal, could the State create such classifications without any concern for scrutiny by this or any other Court?

The answer to each question is, and must be, negative, but the State takes a contrary position.

It does not matter whether a truly nondiscriminatory general sales tax which included a tax on newspapers could pass constitutional muster. Minnesota has never enacted such a sales tax. What Minnesota has done is to impose a use tax on paper and ink, rather than a sales tax on publications, and, by creating a $100,000 per-publication exemption, thereby discriminate between publishers and other industrial users of paper and ink, between foreign and domestic publishers, and between large and small publishers. There are no such substantial discriminations to be found in any of the post-*Grosjean* decisions affirming taxes affecting the press. Minnesota's distorted substitute for legitimate sales and use taxation should, and must, be repudiated by this Court.

Star Tribune respectfully requests this Court to reverse summarily the decision below, or, alternatively, to note probable jurisdiction and to set the case for full briefing and argument on the merits.

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Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS,
CLERK

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Appellee.

On Appeal From The Minnesota Supreme Court

BRIEF AMICUS CURIAE OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. The Minneapolis Star and Tribune Co.'s newspapers, as well as twenty-four other newspapers published throughout the State of Minnesota, hold membership in ANPA.

If the decision of the Minnesota Supreme Court is not reversed, the Minnesota membership of your *amicus* will be adversely affected. Further, if the Minnesota tax statute is found to be constitutional, similar statutes may be enacted in other states, resulting in substantial burdens upon the free press.

ARGUMENT

The Minnesota Newsprint and Ink Tax Is a Discriminatory Tax Against Newspapers in Violation of the First and Fourteenth Amendments.

The Minneapolis Star and Tribune Company has presented in its Jurisdictional Statement a full and accurate discussion of the unconstitutional features of the tax statute challenged in this appeal.[1] ANPA supports the arguments advanced by appellant and will not repeat them here. Our purpose is to stress to this Court that it is the *preservation* of the existing constitutional limitations upon the state's power to tax the press which is at issue in this controversy.[2]

The decision of the Minnesota Supreme Court is a radical departure from the simple, yet irrefutable, principle governing taxation of newspapers. That principle, enunciated in *Grosjean v. American Press Company*, 297 U.S. 233 (1936) and followed in every case since, holds that the press shall bear no greater tax burden than that imposed upon any other enterprise as an ordinary incidence of doing business. Minnesota's narrowly drawn tax, imposed only upon the consumption of paper and ink used in producing regularly-issued publications "for distribution to the general public"[3] is not "an ordinary form of tax, but one single in kind . . ." *Id.* at 250. The evil of this legislation lies in the fact that "being entitled to the advantages granted by the First Amendment, [the press] are singled out and required to pay a special tax that is not required of business in general or some broad portion thereof." *City of Baltimore v. A.S. Abell Co.*, 145 A.2d 111, 118 (Md. 1958).

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[1] Minn. Stat. §297A.14; Minn. Stat §297A.25 subd. 1(i) (1974).

[2] ANPA's discussion herein is limited to that aspect of the statute which discriminates against publishers as compared with all other taxpayers.

[3] *United Hardware Distributing Co. v. Commissioner of Revenue*, 284 N.W. 2d 820 (Minn. 1979).

It must be emphasized that no immunities or privileges for newspapers from laws of general application to their business aspects are asserted here. [4] Rather, it is even-handed treatment for newspaper publishers, guaranteed by the Fourteenth Amendment, which has been denied. And where official discrimination treads upon a First Amendment freedom, the government's burden of justification is especially great.

> When a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the compelling constitutional value from erosion.

Austin v. New Hampshire, 420 U.S. 656 (1975).

There can be no doubt that the discriminatory imposition of the use tax here is a direct burden upon the newspapers' function to inform. Newsprint and ink make the dissemination of the news possible and constitute a major cost of publishing.[5] The tax depletes the funds available to a newspaper to gather, print, and circulate the news. The economic viability of a newspaper cannot be separated from its freedom to disseminate information. "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise." *Cammarano v. U.S.*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

The line between permissible and impermissible taxes upon newspapers is a clear one. In the line of cases following *Grosjean* contesting taxes upon newspapers, each has interpreted its holding to require that a tax against the press *must* be

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[4] *See, e.g., Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937); *Associated Press v. United States*, 326 U.S. 1 (1945); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). Nor is this tax objectionable because "it takes money from the pockets" of newspapers or works a hardship upon the appellant. *Grosjean, supra*, at 250.

[5] In statistics compiled by the Newsprint Information Committee, it was determined that in 1980, newsprint alone constituted 32.3% of the total publishing cost of an average daily newspaper with a circulation comparable to that of appellant. Newsprint Information Committee, *Newspaper and Newsprint Facts at a Glance 1980-81* (23rd ed. 1981).

of general application. *See, e.g., Giragi v. Moore*, 64 P.2d 819 (Ariz.), *appeal dismissed*, 301 U.S. 670 (1937) (upholding privilege tax upon all persons engaged in the sale of merchandise or services within the state); *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947) ("In this case City of Tampa has enacted a gross sales tax. Its application is general."); *Arizona Publishing Co. v. O'Neil*, 22 F. Supp. 117 (D. Ariz.) *aff'd* 304 U.S. 543 (1938) (upholding privilege tax "imposed upon a great number of businesses"); and *City of Corona v. Corona Daily Independent*, 252 P.2d 56 (Cal.) *cert. denied*, 346 U.S. 833 (1953) (upholding nondiscriminatory license fee upon "any person, firm, or corporation" engaging in any business in the city).

The essential protection afforded the press by this requirement of nondiscriminatory tax treatment is gravely threatened by the decision below. The direct tax here upon newspapers' raw materials is applicable only to publishing enterprises. The Minnesota Supreme Court's ruling has rendered meaningless the vital constitutional check upon excesses of state power over protected activities.

> . . . [I]f a valid tax be imposed on businesses that do not enjoy any constitutional immunity, the effect of the impact and the oppressiveness of the tax are matters for the legislative conscience to consider; but, when the tax is imposed upon a business that enjoys one of the constitutional immunities of the First Amendment, it must be general in its nature and character and affect this business only incidentally as it affects other businesses in their combined duty to support the government.

City of Baltimore v. A.S. Abell Co., 145 A2d 111, 118 (Md. 1958).

In upholding the Minnesota use tax upon newspapers, the Minnesota Supreme Court acknowledged its obligation to apply the "strict scrutiny" standard of review, required where First Amendment rights may be infringed. (A-8). Contrary to its conclusion, however, that court's analysis of the legislative

scheme failed to show any state interest which warrants this special burden upon the exercise of a fundamental right.[6]

The court cites as the state's most compelling goal that of raising revenues. (A-12). But general revenue needs of the state justify only general revenue-raising measures, through which all businesses will be taxed equitably and uniformly. To defend an exclusive tax upon newspapers on the basis of revenue needs neglects to take into account the historical setting in which the First Amendment was adopted.

An examination of the circumstances preceding and influencing the adoption of the abridgment clause of the First Amendment reveals that it originated partly in reaction to the oppressive British "taxes on knowledge," which unabashedly sought to oppress and restrain the press. *See*, Chafee, *Freedom of Speech*, 32 (1920); Stevens, *Sources of the Constitution of the United States*, 221 (1894). Significantly, in 1785, just four years prior to adoption of the First Amendment, Massachusetts levied a tax upon newspapers "for which there was no evidence ... that this act was anything more than a revenue measure adopted without expectation of unfavorable influence upon the press ..." Duniway, *Freedom of the Press in Massachusetts*, 136 (1906). Yet so strong were the sentiments against taxation of newspapers that the tax was vehemently denounced and repealed in the following year. A 1786 tax on advertising suffered a similar fate. *Id.* at 136. It was these pure revenue-raising measures in Massachusetts which have been attributed directly to the ultimate incorporation of the free press clause in the Federal Constitution. *Grosjean, supra*, at 248 (citing *Pennsylvania and the Federal Constitution* pg. 181 (1888)). This background strongly suggests that a state must demonstrate more than revenue needs alone to satisfy its constitutional burden to show a "compelling state interest" in justifying a special tax upon the press.

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[6] It is firmly settled that "[t]he power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

The court below further attempts to justify the narrowly targeted use tax on the basis that the legislature sought to offset the publishers' sales tax exemption. (A-12-13). Appellant's Jurisdictional Statement challenges this central premise, on the basis that the aberrant features of the use tax contradict an intention to "compensate" for the sales tax exemption, and in view of the existence of other non-taxed users of paper and ink who are also exempt from the sales tax. The Minnesota Supreme Court's reliance on a compensation theory is unsound for an additional reason. In the absence of any legislative guidance, the Minnesota Supreme Court postulates "this [exemption] may be a result of the difficulties and expense of collecting sales tax upon sales of such low-priced items." (A-13). Your amicus suggest that other, more compelling and plausible bases than that of administrative convenience exist for a sales tax exemption for publications.

The power to exempt, like the power to tax, is one within the legislature's broad discretion, subject to the caveat that such exemptions be enacted for the accomplishment of public purposes for the benefit of the public generally. *United States v. Dept. of Revenue of Illinois,* 202 F. Supp. 757 (N.D. Ill.) *aff'd* 371 U.S. 21 (1962). Without deciding whether a legislature could impose a direct tax upon the sale of newspapers without violating free press guarantees, it is clear that they may exempt newspapers from taxation with the intention of promoting cherished constitutional freedoms. "Legislation to enhance these First Amendment values is the rule, not the exception." *Buckley v. Valeo,* 424 U.S. 1, 93. n. 127 (1976). In order "to secure to the public the benefits to result from the wide dissemination of intelligence as to current events . . . ," the power exists to legislate in favor of publishers. *Lewis Publishing Co. v. Morgan,* 229 U.S. 288, 314 (1912) (discussing statute granting second-class mail privileges to newspapers and other periodicals). A classification which clearly promotes our society's fundamental commitment to a free press should not be used to justify a classification which curtails it.

Sales tax exemptions for publications also may reflect a state's desire to encourage newspaper publishing generally, to

facilitate informed public debate among its citizens. ("The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity . . ." *Grosjean, supra,* at 250.) "[I]t has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 528 (1958).

The legislative record in this case contains no support for the Minnesota Supreme Court's speculative premises concerning the state's intent either with regard to the sales tax exemption, incorporated into the original statute, or with regard to the use tax, levied only upon the state's largest newspapers. The nature and effect of these provisions counsel against the court's hypotheses.[7] Absent evidence of a specific and substantial state interest served, this arbitrary and unjust use tax classification is an invalid infringement upon the affected, and protected, activity.

This Court is respectfully urged to overturn the decision below or accept this case for full review. If permitted to stand, the decision of the Minnesota Supreme Court will set a disturbing new precedent regarding a state's ability to curb expressive activity through discriminatory taxation. The First Amendment prohibits a state from singling out the purveyors of information and forcing them to bear a disproportionate share of the public expense, thus assuring the public the benefits of an unfettered press.

---

[7] "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975).

CONCLUSION

It is respectfully submitted that this Court enter an order noting probable jurisdiction in order that the substantial constitutional questions raised by this appeal can be fully examined.

Respectfully submitted,

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March 2, 1982

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Re: Minneapolis Star and Tribune Company
Minnesota Tax on Newsprint and Ink

Dear Mr. Maguire:

This letter will confirm that appellant Minneapolis Star and Tribune Company consents to the appearance of the American Newspaper Publishers Association as *amicus curiae* in the above appeal before the United States Supreme Court.

Sincerely,

/s/ LAWRENCE C. BROWN

Lawrence C. Brown

LCB/mag

cc: Norton L. Armour

March 9, 1982

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Re: Minneapolis Star & Tribune Co. v.
Commissioner of Revenue
U.S. Supreme Court No. _____

Dear Mr. Maguire:

Please be advised that the Commissioner of Revenue has no objection to the American Newspaper Publishers Association filing briefs as *amicus curiae* in the above matter.

Very truly yours,

WARREN SPANNAUS
Attorney General

/s/ PAUL R. KEMPAINEN

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Office - Supreme Court, U.S.
FILED
APR 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MINNEAPOLIS STAR & TRIBUNE COMPANY,
Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

On Appeal from the Minnesota Supreme Court

BRIEF OF KNIGHT-RIDDER NEWSPAPERS, INC., AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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On Appeal from the Minnesota Supreme Court

BRIEF OF KNIGHT-RIDDER NEWSPAPERS, INC., AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

Knight-Ridder Newspapers, Inc. ("Knight-Ridder"), as *amicus curiae,* urges the Court to note probable jurisdiction in this appeal from the decision of the Minnesota Supreme Court, 314 N.W.2d 201, 7 Med. L. Rep. 2579 (1981), and either to reverse the judgment summarily or to set the case for full briefing and argument on the merits.[1]

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[1] Although Knight-Ridder, as an *amicus curiae,* is not covered by Rule 28.1 of the Supreme Court Rules, it has a substantial financial stake in the outcome of this case and considers it appropriate to comply with the spirit of the Rule. Knight-Ridder has no parent corporation. Its only non-wholly owned subsidiaries and affiliates are Southeast Paper Manufacturing Co.; TKR Cable Company; Bay Cable, Inc.; Fort Wayne Newspapers, Inc.; Fort Wayne Newspapers (a partnership); Long Beach Cablevision, Co.; and the Seattle Times Co.

INTEREST OF THE AMICUS CURIAE

Knight-Ridder is a nationwide communications company engaged in newspaper publishing, television broadcasting, electronic distribution of news, and related enterprises. It is one of the largest newspaper companies in the United States in terms of total weekly circulation. Newspapers owned by Knight-Ridder have a daily circulation of more than 3.6 million and a Sunday circulation of more than 4.1 million.

Knight-Ridder has a direct financial stake in the outcome of this case. Its wholly owned subsidiary, Northwest Publications, Inc., owns four daily newspapers in Minnesota: the St. Paul Pioneer Press, the St. Paul Dispatch, the Duluth News-Tribune and the Duluth Herald. During the years at issue in this litigation, 1974 and 1975, these four newspapers paid more than $493,000 in use taxes under the Minnesota statute challenged by appellant Minneapolis Star and Tribune Company. (A-5 n.4, A-6 n.5.) These payments were more than one-fourth of the total tax payment collected from all newspapers published in the state. Knight-Ridder currently is paying the use tax under protest, filing protective claims for refunds in the event the statute is declared unconstitutional.

Knight-Ridder's interest in this case, however, like the principles at stake, extends well beyond the contours of a single claim for a tax refund. The Minnesota statute at issue, Minn. Stat. § 297A.14,[2] places substantial financial burdens on a few select newspapers. The statute has the potential to raise large sums for state treasuries, while its scheme of exemptions blunts effective political protests. At least one other state already has adopted a similar statute. *See* Iowa Code Ann. § 423.1(1) (West Supp. 1980). If the Minnesota statute is upheld, it is likely that other states, looking for new sources of substantial revenues, will see a green light to follow Minnesota's lead. As the owner of newspapers in 15 other states, Knight-Ridder has a substantial interest in explaining why the decision below stands as a major threat to freedom of the press and sanctions an impermissible burden on constitutionally protected publications.

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[2] The statute is reprinted in footnote 2 of the Minnesota Supreme Court's decision. *See* A-4.

THE QUESTIONS ARE SUBSTANTIAL

The tax challenged in this case is expressly imposed on the raw materials of newspaper publication: newsprint (paper) and ink used in publishing a periodical. It is, therefore, a direct tax on the exercise of freedom of the press. Moreover, both in intent and in effect, it discriminates among publishers. Major newspapers—defined in terms of their circulation, frequency, and number of pages—are made to bear a tax not borne at all, or at a much lower rate, by (1) smaller newspapers, (2) out-of-state newspapers, and (3) other industrial users of the same materials.

Appellant in its jurisdictional statement has presented a full and well-reasoned discussion of why the challenged statute is unconstitutional and should be struck down by this Court. Knight-Ridder supports the arguments advanced by appellant and will not repeat them here. The purpose of this brief is to stress that the Minnesota Supreme Court applied an erroneous legal standard that utterly fails to comport with the principles set forth by this Court to test the validity of taxes that impinge on First Amendment activity.

I. THE MINNESOTA SUPREME COURT APPLIED AN ERRONEOUS STANDARD OF REVIEW.

The Minnesota Supreme Court spoke twice in its decision of employing a "strict standard" of review (A-8, A-12). It employed no such exacting test, however, for in each paragraph in which the court mentioned a "strict standard," the court also concluded that, under *Madden v. Kentucky*, 309 U.S. 83 (1940), the Minnesota state legislature is entitled to "broad discretion as to classification" of who will be taxed and how much. Deferring to this broad discretion, the court sustained a legislative scheme in which three percent of the state's newspapers bear the entire burden of the use tax on newsprint and ink. In upholding the legislature's skewed classifications, the Minnesota Supreme Court failed to apply the appropriate legal standard.

1. This Court has long recognized that a state's exercise of its taxing power may constitute an impermissible impairment of freedom of speech and freedom of the press. *See, e.g., Murdock v. Pennsylvania,* 319 U.S. 105 (1943); *Grosjean v. American Press Co.,* 297 U.S 233 (1936). Thus, when a state's general taxing program deters free speech, it "must be subjected to close analysis and critical judgment," and "due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall,* 357 U.S. 513, 520, 529 (1958).

This Court's decision in *Madden v. Kentucky, supra,* the sole support cited for the Minnesota court's willingness to defer to the legislature's right to make the classifications at issue, was a pure business case involving taxation of bank deposits. There was no shred of First Amendment activity at stake in *Madden,* and the standard enunciated in that decision is wholly inadequate to gauge the permissibility of a tax that singles out the raw materials of newspaper publication for special burdens. As the Court again admonished just this Term, "regulation of First Amendment rights is *always* subject to exacting judicial review," *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California,* ____ U.S. ____, ____ (No. 80-737) (50 U.S.L.W. 4071, 4072, December 15, 1981) (emphasis added). This exacting scrutiny is no less important where the form of the state regulation is through the taxing system.

2. The Minnesota tax on newsprint and ink is doubly objectionable because its burden falls exclusively and deliberately on large, in-state newspapers. The state's obligation, therefore, was not only to come forward with a "compelling governmental interest" for its tax scheme but also to demonstrate that its classifications are "closely fitted to further that interest." *Larson v. Valente,* ____ U.S. ____, ____ (No. 80-1666) (50 U.S.L.W. 4411, 4416, April 21, 1982). Accordingly, the Minnesota Supreme Court was not permitted to accord the legislature "broad discretion" to impose a discriminatory tax on certain classes of newspapers.

3. The Minnesota court, however, did not subject this tax statute to the constitutionally required tests. The Minnesota tax places a significant financial restraint on a newspaper's First Amendment activities as soon as a newspaper purchases the first dollar of newsprint and ink beyond $100,000 in each year. To support this burden, the state should have been required to come forward and justify why this additional dollar of material suddenly merits taxation. The state also should have been required to explain why it chose a system of taxation that burdens state newspapers but not papers from outside Minnesota, and that burdens newspapers but not manufacturers using the same materials to produce, for instance, sales-tax exempt milk cartons.

The Minnesota Supreme Court should have refused to permit this tax on newspaper publication unless it was satisfied that the state had met its burden. Instead, the court weakly noted that the goal of the statute is to raise revenue and meekly accepted, without further inquiry or analysis, the "suggestion" by the Commissioner of Revenue that the $100,000 exemption might be justified as reflecting "a legislative policy to give favorable tax treatment to smaller enterprises" (A-17). This observation, however, merely begs the constitutional question, because it fails to justify a policy of giving unfavorable tax treatment to larger newspaper enterprises. The Minnesota Supreme Court thus abdicated its constitutional responsibility by indulging in uncritical deference to the legislature's discretion to classify taxpayers into differing categories. The failure to apply a constitutionally sufficient standard of review dooms the court's judgment.

II. THE COURT BELOW DISREGARDED THIS COURT'S PRECEDENTS HOLDING DISCRIMINATORY TAXES UNCONSTITUTIONAL.

1. In *Grosjean v. American Press Co., supra,* this Court struck down as a violation of the First Amendment a license tax on newspapers published in Louisiana. The tax was measured by gross receipts and applied only to 13 newspapers with large circulations. The Minnesota tax, which taxes the raw materials

of newspaper publication in Minnesota, similarly applied only to 11 large newspapers in 1974 and to 13 in 1975. Despite the clear parallels between the cases, the Minnesota Supreme Court sustained the tax here because it is labeled a "use" tax rather than a "license" tax. This facile attempt to limit *Grosjean* disserves the important First Amendment principle for which *Grosjean* stands: taxes aimed unequally at newspapers offend the Constitution. Following this Court's decision in *Grosjean*, other states have declared unconstitutional other varieties of discriminatory taxes levied on publishers. *E.g.*, *City of Baltimore v. A.S. Abell Co.*, 218 Md. 273, 145 A.2d 111 (1958); *City of Tampa v. Tampa Times Co.*, 153 Fla. 709, 15 So.2d 612 (1943).

The few cases upholding business taxes on newspapers underscore the error committed by the Minnesota Supreme Court. In each of those cases, *see, e.g.*, *Territory of Alaska v. Journal Printing Co.*, 135 F. Supp. 169 (D. Alaska 1955); *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937); *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947), the newspaper was subject to a tax identical in nature to the taxes imposed on all businesses. Thus, those taxes were neutral in form and in effect. Although the Minnesota Supreme Court blithely described the tax challenged here as part of "a general system of sales and use taxation" (A-12), the fact is that the larger Minnesota newspapers—and only the larger ones—are subject to a specially crafted use tax while the vast majority of goods distributed in the state are subject to a sales tax.

This difference is significant. For instance, out-of-state competitors of Minnesota newspapers are not subject to any tax, yet out-of-state competitors of other businesses in the state face tax burdens equivalent to those of the Minnesota businesses. The use tax hinders any effort by a newspaper to expand its product and give readers additional pages of information at no additional cost. These efforts increase a newspaper's tax burden under the use tax, yet other Minnesota businesses can engage in parallel activity without incurring any additional tax for themselves or their customers. Finally, because the statute provides a unique $100,000 exemption from the use tax on

newsprint and ink, larger newspapers are disadvantaged vis-a-vis their smaller competitors; with a sales tax, there is no similar discrimination against larger businesses.

The characterization of the Minnesota tax as a "use" tax does not shield it from the Court's holding in *Grosjean.* The selective imposition of the Minnesota use tax is at odds with the even-handedness demanded by the First Amendment. The pernicious effect of the Minnesota tax in this case is clear: the exemption mutes the opposition of small, local newspapers, which often exert great pressure on individual legislators, while permitting the legislature to focus its collective animus on the few large, regional newspapers that provide the most penetrating coverage of state affairs. The Minnesota court's failure to recognize the discriminatory effects of the use tax on large Minnesota newspapers is fatal to its conclusion that, despite *Grosjean,* the tax can be sustained as simply a non-discriminatory part of a general business tax program.

2. The court below was similarly disdainful of this Court's decision in *Stewart Dry Goods Co. v. Lewis,* 294 U.S. 550 (1935). In that case, even in the absence of a First Amendment component, the Court held invalid on equal protection grounds a gross-sales tax that imposed higher tax rates on higher volumes of sales. The Minnesota Supreme Court announced that it did "not find the reasoning of *Stewart Dry Goods* .... persuasive" because the Minnesota tax "is not a 'privilege' tax" (A-17). This supposed distinction is weak, since the Minnesota statute explicitly states that the rationale for the tax at issue here is to charge for "the privilege of using, storing or consuming in Minnesota" the newsprint, ink, and other items subject to the tax. *See* A-4 n.2. The Minnesota Supreme Court exceeded its authority in treating *Stewart Dry Goods* as no longer binding on lower courts.

3. The Minnesota Supreme Court erred fundamentally in rejecting appellant's contention that "the legislature may not create a tax exemption which favors publishing enterprises unequally" (A-18). Although the court accurately noted that the facts of *Buckley v. Valeo,* 424 U.S. 1 (1976), were different, it failed to recognize that, under *Buckley* and other First

Amendment decisions of this Court, the state may not consciously favor one group's efforts at protected expression over those of another group. Here, however, the Minnesota legislature has made a conscious, calculated decision that larger newspapers are to be subjected to a tax that smaller newspapers are not to bear. Just as the government may not constitutionally permit only certain categories of people to speak at public meetings, *see City of Madison Joint School District v. Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976), or permit only certain types of organizations to picket, *see Police Department of the City of Chicago v. Mosley,* 408 U.S. 92 (1972), the government may not charge large newspapers a fee for printing that is not likewise borne by smaller newspapers.

On April 21, 1982, the Court struck down a Minnesota statute that favored some religious denominations over others. *Larson v. Valente, supra.* The Court noted that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." ___ U.S. at ___ (50 U.S.L.W. at 4415). In support of this conclusion, the Court quoted Justice Jackson's statement of the more general principle that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* at ___ (50 U.S.L.W. at 4416), *citing Railway Express Agency v. New York,* 336 U.S. 106, 112 (1949). Under the First Amendment's guarantee of freedom of the press, the same standard must apply to newspapers. In the absence of some compelling state interest and of a program carefully tailored to that interest, the state may not constitutionally prefer one group of newspapers over another.

This case does not involve the validity of a general business regulation, such as a progressive income tax, that incidentally might affect publishers unequally. Even though, under such a system, large newspapers might bear a disproportionately large tax when compared with the tax to be paid by smaller newspapers, the larger papers at least would be treated equally with other corporations of comparable income. A progressive income tax varies neutrally with profits, not size.

By contrast, the tax in question here is not a general business tax; it focuses on the raw materials of publishing newspapers. It contains a unique $100,000 exemption, and thus is based solely on the extent of the publisher's activities. As the court below acknowledged, the $100,000 exemption is designed to favor publishers who use small amounts of newsprint and ink over publishers who use larger amounts. This type of selectivity is not permissible under the First Amendment.

III. THE ISSUE IS IMPORTANT.

So long as the taxing scheme at issue in this case is allowed to continue, some Minnesota newspapers will be subjected to a substantial and continuing burden that is wholly inconsistent with the First Amendment. The sums of money at stake are large and growing larger—the tax rate was raised to five percent effective June 30, 1981—and the vast bulk of this tax is borne by two publishers, the appellant and the *amicus curiae*. Small competitors and out-of-state newspapers face no comparable tax burden.

More importantly, Minnesota's newspaper tax, if left in force, may well be copied by other states that are facing the need to develop new sources of revenue. This tax raises substantial revenue from a small, highly selective group of taxpayers. Iowa has already instituted a similar tax, effective on deliveries of newsprint and ink after January 1, 1980. In addition, for example, the Michigan legislature is actively considering a bill (H.B. 5626) to impose a new tax on newsprint and ink used by publishers as part of an alternative to increasing the state income tax. The decision of the Minnesota Supreme Court, which relies on little more than the state's need to raise money and deference to the state's general authority to classify taxpayers, offends the First Amendment and should not be left to stand as a model for other states.

CONCLUSION

Unless the Court reverses the judgment below summarily, probable jurisdiction should be noted and the case set for full briefing and argument.

Respectfully submitted.

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April 1982.

81-1839

Supreme Court, U.S.
FILED
APR 9 1982
ALEXANDER L. STEVAS
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MINNEAPOLIS STAR AND TRIBUNE COMPANY,
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MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

On Appeal from the Minnesota Supreme Court

BRIEF OF THE MINNESOTA CIVIL LIBERTIES UNION *AMICUS CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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Schwartz, The Bill of Rights: A Documentary History (1971) 25, 26

Siebert, Freedom of the Press in England 1776-1776 (1952) 17

MISCELLANEOUS:

Minn. Atty. Gen. Op. No. 90 (1948) 39

St. Paul Dispatch or Pioneer/Press Dispatch 2, 12, 13, 40

INTEREST OF AMICUS[1]

The Minnesota Civil Liberties Union (MCLU) is a private, non-profit, membership-only organization having approximately 3,500 members in the State of Minnesota. It is a state affiliate of the American Civil Liberties Union and has as its purpose the protection of the rights and liberties preserved to the people by the Minnesota and United States Constitutions. Foremost among those liberties is the freedom of speech and the press, and the MCLU has been active in the defense of these freedoms against laws that limit the flow of information the first amendment was enacted to secure.

The law at issue here substantially abridges first amendment rights and de-

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[1] Letters from both parties consenting to the filing of the brief have been lodged with the Clerk of this Court.

nies equal protection of the laws by singling out a few large newspapers for a heavy tax. Because of the severe threat such taxes will pose, if upheld, to our nation's fragile and crucial major newspapers, the Minnesota Civil Liberties Union submits this brief amicus curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief and the appellant's jurisdictional statement are being filed at a poignant moment: just after the announcement that the afternoon Star will be merged into the morning Tribune. According to a front-page story in the St. Paul Dispatch, March 24, 1982, "about 35 reporters and editors and 20 newsroom support people are facing layoffs. About 35 positions will be eliminated in the production and distribution departments." Even more significant losers, however,

will be the Star's 170,000 readers, as Minneapolis follows a sad national trend. The Star joins a casualty roll that already includes the Washington Star, the Philadelphia Bulletin, the Chicago Daily News and many others.

The present case is a constitutional challenge to Minnesota's "big newspaper tax," Minn. Stat. § 297A.14, third paragraph, which exploits the two major newspaper companies in the Twin Cities of Minneapolis and St. Paul as a revenue source while having little effect, and in almost all cases no effect at all, on the hundreds of other newspapers in the state. The tax is paid only by publishers, and there is no evidence that it has ever been paid by anyone except publishers of newspapers. In 1974 and 1975, the only years for which data appear in the record, the two major Twin Cities newspaper companies paid almost 91% of all

taxes collected under this law, and only eleven others paid anything at all in either year. Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201, 203-204 (Minn. 1981).

It appears that no other state has a "big newspaper tax" of any sort at present, and the only closely similar statute of which we are aware is the Louisiana tax on newspapers with circulations exceeding 20,000 struck down by this Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).[2] As in this case, the Louisiana statute was challenged on

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[2] Another somewhat similar case is City of Tampa v. Tampa Times, 153 Fla. 709, 15 So.2d 612 (1943), in which the Florida Supreme Court, relying on Grosjean, struck down a city license tax on newspapers of $40 for newspapers with less than 10,000 circulation, $500 from 10,000 to 30,000 circulation, and $700 for circulation exceeding 30,000. The facts of the present case, however, are much more dramatic: all newspapers paid at least $40 in Tampa, whereas 97% pay nothing in Minnesota, and the difference between the largest and the smallest was only $660 in Tampa, but is over $600,000 in Minnesota.

both first amendment and equal protection grounds. The Grosjean Court, however, in an opinion signed by Justice Sutherland but reportedly including a substantial contribution by Justice Cardozo,[3] spoke eloquently of the impossibility of such a tax under the first amendment, but found it unnecessary to reach the question of equal protection.[4]

The present case was an action for a refund brought by the Minneapolis Star and Tribune Company, which alone paid 67 and 68 percent of all taxes collected under this law in 1974 and 1975. The state District Court held the third paragraph of § 297A.14 unconstitutional under the free press and equal protection provi-

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[3] See I. Brant, The Bill of Rights 397-399 (1967).

[4] The district court, however, had found the Louisiana tax unconstitutional on equal protection grounds. American Press Co. v. Grosjean, 10 F. Supp. 161 (E.D. La. 1935).

sions of the United States and Minnesota Constitutions, and ordered the refund.

On appeal by the Commissioner of Revenue, the Minnesota Supreme Court reversed, upholding the tax essentially on the ground that it was part of a general, broadly based scheme of sales and use taxes. Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201 (Minn. 1981). From this premise, it was held to follow that no equal protection issue arose as between newspapers and others subject to sales or use taxes, and that no first amendment issue arose at all, despite Grosjean, because the tax was on businesses rather than on expression. As to the focus on two or three companies and the virtual or complete exemption for the rest, the court found no equal protection problem, noting that the distinction "may be justified as a legislative policy to give favorable tax treat-

ment to smaller enterprises,"[5] 314 N.W.2d at 209, although the Legislature had not stated this or any other justification. The court asserted that it was applying a "strict standard" of review, 314 N.W.2d at 207, but its version of strict scrutiny consisted of just two sentences:

> The sales and use tax law is a revenue-raising measure. This is perhaps the most compelling goal of a state government.

Id. Nothing in the opinion discusses whether, or even states that, the classification is necessary to the statute's articulated compelling interest.

Amicus urges that the decision of the Minnesota Supreme Court be summarily reversed, or in the alternative set for oral argument, because:

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[5] Compare Buckley v. Valeo, 424 U. S. 1, 48 (1976): "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."

1) the rulings of the Minnesota Supreme Court were based on a grossly distorted interpretation of the facts, which is flatly contradicted by the information given in that court's own opinion;

2) the form, impact and potential for abuse inherent in the unique type of tax imposed by Minnesota make it substantially identical to the Stamp Taxes and taxes on paper that it was among the purposes of the first amendment to forbid; and

3) the Minnesota Supreme Court's novel approach to strict scrutiny, requiring a compelling interest but not that any relationship between the classification and the interest be shown, is contrary to every relevant modern decision of this Court.

ARGUMENT

I. THE "BIG NEWSPAPER TAX" APPLIES ONLY TO A FEW NEWSPAPERS, AND IS NOT AN ORDINARY PART OF A GENERAL SYSTEM OF SALES AND USE TAXES.

The predecessor of today's "big newspaper tax," in the form of a tax on paper and ink used by publishers of periodicals, was adopted by the Minnesota Legislature in 1971. Minn. Laws 1971, Sp. Sess., ch. 31, art. 1, § 5, subd. 1(i). That original law, however, applied to all paper and ink used in producing publications of all sorts, and accordingly aroused opposition from all parts of the state.

Perhaps this opposition would have led to the repeal of the tax in the Legislature's 1973 session. There is no legislative history, but it may be inferred that when the clever suggestion

was made that rural, small-town and weekly newspapers (and apparently all publications other than newspapers) be exempted by limiting the tax to annual usage in excess of $100,000, most of the opposition evaporated. A tax on New York City is a pleasant idea to Upstaters. A tax on Chicago is a pleasant idea to Downstaters. And a tax on "the Cities" is a pleasant idea to Minnesota Outstaters.

In 1974 and 1975, the only years for which data appear in the record:

1)	the two major Twin Cities companies paid a total of	$1,664,635
2)	one company in Duluth paid a total of	72,267
3)	all others combined paid a total of	99,508

Perhaps such matters should ordinarily be left to the political processes,

subject to the "one person, one vote" principle of Reynolds v. Sims, 377 U.S. 533 (1964). But this is not just a tax on the big cities; it is a tax on the big-city newspapers.

Only newspaper companies pay this tax. Only a couple of newspaper companies pay more than a nuisance amount of tax--enough, for example, to justify the lawyer's fee for the first level of court challenge. 314 N.W.2d at 203-204. The great majority, 97% of Minnesota newspapers, pay nothing at all. Other industrial users of paper and ink, including, for example, tax-exempt producers of food packaging, pay nothing at all.

In two years, the Star and Tribune Company paid more than $1.2 million.

It would be too much to claim that the "big newspaper tax" killed the Star, or was intended to. But it would not be an exaggeration to say that its contribu-

tion was significant. In the fiscal year ended February 28, 1982, the Star and Tribune Company's net operating margin was only about $3.6 million, including its newspapers in other states and its television stations. St. Paul Pioneer Press/Dispatch, March 29, 1982, at 1B, col. 2.

The Minnesota Supreme Court, however, characterized the tax as part of a general revenue-raising scheme. This Court has carefully distinquished between general business regulations, to which newspapers are subject in the same way as other businesses, and specific impositions on newspapers and expressive activity, which are highly suspect. See, e.g., Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (Fair Labor Standards Act). Recognizing this, the Minnesota Supreme Court offered the theory that the "use tax" on newspapers,

which are not subject to a sales tax, puts them in the same position as businesses whose products are subject to the sales tax. In its view, that made both the free press objections and the equal protection objections disappear:

> It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota.[6] Unlike the type of tax found to be unconstitutional in Gros-

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[6] A footnote at this point reads, "Iowa imposes a similar tax on newsprint and ink. Iowa Code Ann. § 423.1, subd. 1 (West Supp. 1980)." The Iowa statute is indeed the only other law currently in effect that we have been able to find imposing a tax on paper and ink used by newspapers. It is far from "similar" to Minnesota's "big newspaper tax," however, because it applies to all newspapers, and even to "free newspaper[s] or shoppers guide[s]." Thus the similarity would only be to the 1971 version of the Minnesota statute, supra. Even so, it appears to share the constitutional infirmity of the Minnesota statute in that newspapers are singled out for a tax not imposed on other businesses. No decision on the constitutionality of the Iowa statute has been found.

It may not be insignificant that at least one major Iowa newspaper company, the Des Moines Register and Tribune Company, is currently in serious financial difficulty. St. Paul Dispatch, March 19, 1982, at 11B, col. 2.

> jean, sales and use taxes are now commonplace and readily accepted. [Citations omitted.]

314 N.W.2d at 207.

The claim is not, of course, that "use taxes" on the paper and ink used by newspapers are widely accepted, for they are not. Rather it is that Minnesota's tax on paper and ink must be considered part of a general system of sales and use taxes, and that systems of sales and use taxes are widely accepted. This is suspiciously close to a claim that any tax, however obvious its unconstitutionality, can be saved by re-labelling it a "use tax."

In fact, the "use tax" on paper and ink resembles other use taxes in name only. Minn. Stat. § 297A.14 imposes a use tax on various personal property "unless the [sales] tax imposed by section 297A.02 was paid on said sales price. . . ." Section 297A.24 allows a deduc-

tion for the full amount of any tax on "sale, storage, use or other consumption" of the property in any other state, adding:

> If such tax imposed in such other state was equal to or greater than the tax imposed in this state, then no tax shall be due from such person under section 297A.14.

Thus the use tax on products other than newspapers is a "compensating" use tax, whose primary effect is to equalize competition between Minnesota retailers and retailers in states with lower sales taxes.

The "use tax" on newspapers, however, has a completely different, and even opposite, effect. Far from imposing a matching burden on out-of-state competitors, it imposes an unmatched burden on a few Minnesota newspapers. Newspapers printed in other states, such as the Wall Street Journal, the Christian Sci-

ence Monitor and the New York Times (all now widely available in Minnesota cities --in fact, home delivery of the Times is now available in some areas) pay no Minnesota taxes, and would pay none however large their circulation became. Nor do they pay similar taxes in the states where they are printed. Perhaps most tellingly, they are not subject to the true compensating use tax applied to various other products from out of state. One cannot help observing that the national and out-of-state newspapers rarely criticize Minnesota politicians.

II. THE "BIG NEWSPAPER TAX" IS SIMILAR IN FORM, IMPACT AND POTENTIAL TO THE STAMP TAXES AND TAXES ON PAPER THAT IT WAS AMONG THE FIRST AMENDMENT'S PURPOSES TO FORBID.

A.

Taxation as an instrument for control of the press first appeared in England in the Stamp Act of 1712, 10 Anne cap. 18, which taxed newspapers, advertisements and paper. The history of these despised taxes and their contribution to unifying the American colonists in rebellion against England is recounted by historians such as F. Siebert, Freedom of the Press in England 1476-1776, 305-322 (1952); C. Collett, History of the Taxes on Knowledge (1899); Z. Chafee, Jr., Free Speech in the United States (1967); and by the Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).

The Stamp Tax of 1765 outraged the colonists. Prime Minister George Grenville had touched "each nerve center in American life at which either economic or intellectual activity was registered." J. Pole, Foundations of American Indepen-

dence, 1763-1815, 42 (1973). "No group in America was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M. Jensen, The Founding of a Nation 126 (1968). The 1765 act required all legal documents, official papers, books and newspapers to be printed on a stamped paper carrying a special tax. There was an additional tax on each advertisement. The tax was heavy in proportion to the value of the item taxed. Some newspapers set off their columns with heavy black mourning margins the day before the tax went into effect, while others printed silhouetted skulls and crossed bones to symbolize a dead free press. J. Lofton, The Press as Guardian of the First Amendment 2 (1980); Jensen, supra, at 127. Many publishers defied the law. "The newspapers played a tremendous role in political life from the Stamp Act on-

ward." Id. Newspapers reprinted liberally from each other, thus helping to unite the colonies. They appealed to the masses, stirred their emotions and urged them to action. Id. at 128. Thus the British themselves helped to make the American press an instrument of revolution. Lofton, supra, at 2; Pole, supra, at 423.

In 1765, an assembly of delegates from nine of the colonies met as the "Stamp Act Congress" to protest the tax. A formal complaint was issued, entitled "A Declaration of Rights and Grievances," the basic principles of which were later incorporated into the Declaration of Independence. Because of this opposition, the American Stamp Tax was repealed less than a year after its enactment. Chafee, supra, at 321.

The English were surprised by the colonists' reaction, but the history of

similar taxes in both New York and Massachusetts should have been a sufficient warning.

New York had a short-lived tax on paper from 1756 to 1760, which met with opposition including broadsides from printers about freedom of the press. L. Levy, Judgments: Essays on American Constitutional History 128 (1972).

In Massachusetts a short-lived tax on paper was in effect from January 1755 to May 1757, forcing one Boston newspaper out of business. C. Duniway, The Development of Feeedom of the Press in Massachusetts 120 (1906). The press of Massachusetts continued its agitation against the colonial government and for freedom of the press. The English governor attempted to bring a libel charge against the Boston Gazette in 1768, but the colonial legislature refused to indict the editors. The governor prorogued the leg-

islature and attempted to get an indictment from the grand jury, but it too refused. The Gazette, freed from the threat of government prosecution for libel, brought up the recent specter of the Stamp Act stating, "Only tyrants and their tools are afraid of a free press and these are the men who forged the Stamp Act and who have forged other 'chains and manacles' for the people." Jensen, supra, at 254-4.

In 1785, Massachusetts imposed a stamp tax on newspapers. This was purely a revenue measure, but there was again much agitation. The tax was denounced as "the first Stone in the fabrick of Tyranny" in the Massachusetts Centinel. It was also argued that once allowed it might become punitive and so end press freedom, and that it discriminated against Massachusetts printers, because the presses of the neighboring states

could freely send their product into Massachusetts. The tax was repealed a year later. To replace the lost revenue the state levied a tax on advertising, which was also resented. Duniway, supra, at 136-37 (emphasis in original).

One editor, Isaiah Thomas, suspended publication of his newspaper, the Massachusetts Gazette. In a letter to the editor of the Massachusetts Spy, he stated, "The tax on News-Paper Advertisements has a direct tendency not only to restrain, but to destroy, those necessary vehicles of publick information, by taking away their only support. . . ." R. McCoy (ed.), Freedom of the Press 451 (1978). The tax was repealed in 1788. Thomas resumed publication after the two-year tax with greetings of thankfulness that the legislature had restored the constitutional liberty of the press. Duniway, supra, at 137.

Richard Henry Lee of Virginia, who later signed the Declaration of Independence and was president of the Continental Congress, rose to political prominence about the time of the British Stamp Act of 1765. He thought it a threat to the rights of Englishmen, and became a popular hero and a leader of the Sons of Liberty in Virginia, in part by expressing that view. E. & H. Morgan, The Stamp Act Crisis 293-94 (1953); L. Levy (ed.), Freedom of the Press from Zenger to Jefferson 142 (1966). When the Constitution was proposed, he became a leading Anti-Federalist, and in his Letters from the Federal Farmer voiced the concerns arising from the lack of a Bill of Rights, emphasizing the fears his earlier experiences showed him to be real threats:

> All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by

any taxes, duties, or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. But, say the advocates, all powers not given are reserved:--true; but the great question is, are not powers given, in the exercise of which this right may be destroyed . . . By art. 1. sect. 8. congress will have power to lay and collect taxes, duties, imports and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever--taxes on houses, lands, polls, industry, merchandize, &c.--taxes on deeds, bonds, and all written instruments--on writs, pleas, and all judicial proceedings, on licences, naval officers papers, &c. on newspapers, advertisements, &c. and to require bonds of the naval officers, clerks, printers, &c. to account for the taxes that may become due on papers that go through their hands. Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it. There may be other powers given, in the exercise of which this freedom may be effected; and certainly it is of too much importance to be left thus liable to be taxed, and

> constantly to constructions and inferences.

L. Levy (ed.), Freedom of the Press from Zenger to Jefferson 143-44 (1966).

The New York Anti-Federalist Melancton Smith, in his Address to the People of New York in 1788, agreed: "We contend, that by the indefinite powers granted to the general government, the liberty of the press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom." 1 B. Schwartz (ed.), The Bill of Rights: A Documentary History 576 (1971).

In response, Federalists asserted that a Bill of Rights was unnecessary because the powers of the government were enumerated and did not include any power over the press. E.g., 1 B. Schwartz, supra, at 444; The Federalist No. 84 (A. Hamilton). James Iredell, later to be a

Justice of this Court, stated:

> The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. . . .If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.

1 B. Schwartz, supra, at 454.

Federalists and Anti-Federalists are thus seen to have agreed that Congress ought not to be allowed to tax the press, and perhaps that such taxes would be contrary to natural law. They disagreed only as to whether the point needed to be spelled out as part of a Bill of Rights or could be relied on as implicit in a system of enumerated powers. In the end, the Federalists got their Constitution, but only on the understanding that a Bill of Rights would be added.

B.

Like the Stamp Act of 1712, the Massachusetts acts of 1755 and 1785, the New York act of 1756 and the Stamp Act of 1765, the Minnesota statute is in part a tax on paper. Indeed, it outdoes them by also taxing ink. "[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

In Grosjean, the Court said nothing about Huey Long and the political background of the newspaper tax. Even the issue of equal protection, relied on by the district court, American Press Co. v. Grosjean, 10 F. Supp. 161 (E.D. La. 1935), was omitted from this Court's discussion, because the Court preferred to emphasize first amendment principles. The Court's opinion, by Justices Suther-

land and Cardozo, stood on high ground:

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

297 U.S. at 250.

The Minnesota Supreme Court seeks to drain this paragraph of its force by omitting several of its sentences. 314 N.W.2d at 206. But even what remains can be given the interpretation urged by that court only if one has not read the remainder of the Court's opinion, for the words "in the light of its history and of its present setting" are the only words in the entire opinion that can be read as referring in any way to the political situation in Louisiana.

Other courts, however, sought to narrow the impact of Grosjean by emphasizing the matters this Court had chosen to omit. A justice of the Arizona Supreme Court immediately characterized Grosjean as based on "a situation . . . in the state of Louisiana which was unparalleled in American history." Giragi v. Moore, 49 Ariz. 74, 85, 64 P.2d 819, 823 (Lockwood, J., concurring), appeal

dismissed, 301 U.S. 670 (1937). As a distinction, however, this was surely overkill, because the Arizona tax applied to "the sales or gross income of practically every person or concern engaged in selling merchandise or services in the state." 49 Ariz. at 79, 64 P.2d at 821. No tax could more easily be distinguished from the tax only on newspapers with a circulation exceeding 20,000 in Louisiana, or the tax only on newspapers using more than $100,000 worth of paper and ink in Minnesota.

This Court has not sought to confine Grosjean to its "unparalleled" facts. Instead it has treated burdens that single out newspapers as highly suspect, but general regulation and taxation, in which newspapers are treated like all or most other enterprises, as proper. For example, in Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946), a newspaper was

held subject to the Fair Labor Standards Act of 1938. The Court distinguished Grosjean:

> There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects, it has no special immunity from laws applicable to business in general. [Citation omitted.][7]

Id. at 184. Much the same point seems to have been made in Grosjean itself, when

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[7] The Court continued:

> And the exemption of small weeklies and semi-weeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers. Grosjean v. American Press Co., supra, p. 250. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. [Citation omitted].

327 U.S. at 184. Plainly there is no evidence of such a benign intent in the present case. Quite the contrary: if it is accepted arguendo that the so-called "use tax" is to compensate for a sales-tax exemption, the smaller Minnesota newspapers are given an advantage not enjoyed by "other small town enterprises," which are subject to sales taxes.

the Court observed, "The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented." 297 U.S. at 250.

Although the Arizona Supreme Court's reading of Grosjean was extremely narrow in Giragi v. Moore, supra, this Court's dismissal of the appeal appears to have been justified on the facts. The Court can hardly be expected to make a habit of accepting cases for oral argument and disposition by full opinions merely to affirm with more narrowly stated reasons.

The present decision, in sharp contrast, will, if allowed to stand, open the door to widespread use of a particularly burdensome and offensive tax at a moment when the press is particularly vulnerable.

III. THE MINNESOTA SUPREME COURT CORRECTLY STATED THAT STRICT SCRUTINY WAS APPROPRIATE, BUT FAILED TO APPLY THAT RULE; ANALYSIS OF THE FACTS SHOWS, HOWEVER, THAT EVEN THE MINIMUM RATIONALITY OF THE STATUTE IS IN DOUBT.

A.

The Minnesota Supreme Court did not just misinterpret or alter strict scrutiny; it did not apply the rule at all.

Applying the standard analysis, we would say that the Minnesota statute's classification affects the fundamental freedom of speech and the press.[8] Ac-

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[8] The equal protection/fundamental freedom statement of the problem in the text is the analysis preferred by the Minnesota Civil Liberties Union. It would appear, however, that a tax graduated in this way unconstitutionally denies equal protection if applied to any sort of business, even without first amendment overtones. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, rehearing denied, 295 U.S. 768 (1935).

cordingly, strict scrutiny is appropriate:

> This test means that the justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end. . . . The Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or "overriding" end--one whose value is so great that it justifies the limitation of fundamental constitutional values. Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote that compelling interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.

J. Nowak, R. Rotunda & J. N. Young, Constitutional Law 524 (1978). See Elrod v. Burns, 427 U.S. 347, 362-363 (1976).

The classification established by the third paragraph of Minn. Stat. § 297A.14 is (1) newspapers using over $100,000 worth of paper and ink, and (2) everyone else. The Minnesota Supreme Court asserts that the relevant governmental interest is revenue raising, and that "[t]his is perhaps the most compelling goal of a state government." Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201, 207 (Minn. 1981). The court's analysis stops at that point, apparently indicating (1) that the necessity of this classification if this end is to be achieved is so self-evident as to make articulation superfluous, or (2) that a different rule of federal constitutional law applies in Minnesota. The latter would be along the lines of "any statute is permissible if it appears to be related to a compelling goal, such as raising revenue."

We are unwilling to presume, and we assume that this Court will not presume, that the Minnesota Supreme Court intended to defy all of this Court's modern rulings on equal protection. The Minnesota Supreme Court must therefore be understood to have meant that it had determined, through its independent examination of the facts, that the classification is necessary to revenue raising, and that this revenue could not be collected effectively without a classification of at least this general type.

But this too is nonsense. It is obvious that a great deal more revenue would be raised without the exemption of 97% of the state's newspapers and all of the out-of-state newspapers. That is, revenue raising may well be "the most compelling goal of a state government," 314 N.W.2d at 207, but it clearly is not the goal of § 297A.14, third paragraph.

The statute has no legislative history, and therefore no articulated purpose. But

> [s]tatutes that trench on fundamental liberties, like those affecting significantly the structure of our government, are not entitled to the same presumption of constitutionality we normally accord legislation. [Citation omitted.] The burden of justification is reversed; the burden rests upon government, not on the individual whose liberties are affected, to justify the measure. [Citation omitted.]

Nixon v. Administrator of General Services, 433 U.S. 425, 526-527 (1977) (Burger, C.J., dissenting). Even where a less exacting standard than strict scrutiny applies, the Court has ignored unarticulated rationales in striking down legislation. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 505 (1965) (White, J., concurring); Cleveland Board of Education v. LaFleur, 414 U.S. 632,

653 (1974)(Powell, J., concurring in the result).

In minimum rationality cases, this Court has sometimes accepted a "conceivable basis" for a statute whose purpose was not articulated, demanding only that the basis, assuming it to exist, would be legitimate, and that it not be inconsistent with the known facts. See, e.g., Allied Stores v. Bowers, 358 U.S. 522, 530 (1959). Even if that is the standard, the "big newspaper tax" is difficult to justify. If its purpose is posited to be giving smaller newspapers a competitive advantage over the larger ones, the Court has often stated that purpose to be unconstitutional. Buckley v. Valeo, 424 U.S. 1, 48 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens Against Rent Control v. City of Berkeley, 102 S.Ct. 434 (1981).

In searching for a rationale, one is eventually compelled to inquire: if the state wished to tax newspapers as part of a general scheme of sales taxes, why did it not simply impose a sales tax on newspapers? One reason appears to be that in 1948 the Minnesota Attorney General advised the Minneapolis City Attorney that such a tax would be unconstitutional. Minn. Atty. Gen. Op. No. 90 (1948). It would seem to go without saying that if a sales tax on newspapers would be unconstitutional, any tax intended to compensate for the newspapers' sales-tax exemption must be equally unconstitutional.

If, on the other hand, a sales tax on newspapers would not be unconstitutional, the point of the "use tax" must be that it accomplishes something a sales tax could not. The Minnesota Supreme Court refers at one point to "the difficulties and expense of collecting sales

tax upon sales of such low-priced items," 314 N.W.2d at 207, but the Minnesota sales tax applies to other products costing as little as ten cents. Minn. Stat. § 297A.03. Beginning May 1, 1982, it will apply to candy and soft drinks. St. Paul Pioneer Press/Dispatch, March 20, 1982, at 1, col. 5.

Even if the real concern were, say, the difficulties in imposing tax-collection duties on carriers (who collect monthly or bi-monthly anyway, not daily), Minnesota could have adopted an exemption for newspapers delivered by carriers while imposing the tax on newspapers sold by others. See, e.g., W. Va. Code § 11-15-9(12).

"How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" Attributed to Sher-

lock Holmes by A. C. Doyle, The Sign of Four (1890)(emphasis in original).

CONCLUSION

The tax on paper and ink necessarily reduces publication, if not directly then indirectly by forcing up the prices of advertising and subscriptions. But a tax that tends to discourage a constitutionally protected activity requires a heightened sensitivity to its particular effects. In this case, it is clear that the Minnesota Legislature has gained a weapon that can be used with great precision against particular newspapers. It is the very precision of the "use tax" that makes it such an offensive violation of the freedom of the press.

Compared to the enormous burden it places on free expression and particularly on a few big newspapers, this tax

generates a small portion of Minnesota's ($3.6 billion in fiscal 1980) overall revenues. But it provides a constant threat to a few publishers who must now look over their shoulders toward the legislature, knowing that it is capable of directly penalizing them without fear of affecting other business constituents. If the decision is allowed to stand, the same weapon may be available to the legislatures of other states.

The decision of the Minnesota Supreme Court undermines fundamental first amendment principles. The Minnesota Civil Liberties Union urges this Court to reverse summarily, or in the alternative to note probable jurisdiction and to set the case for full briefing and argument on the merits.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
AUG 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Is the use tax which Minn. Stat. § 297A.14 imposes on paper and ink consumed in publishing newspapers a "tax on knowledge" prohibited by the First and Fourteenth Amendments?

2. By exempting from taxation the first $100,000 of paper and ink consumed annually by each publication, with the result that 97 percent of Minnesota's publishers pay no use tax while appellant alone pays two-thirds of the use taxes collected, does Minn. Stat. § 297A.14 violate the First and Fourteenth Amendments by discriminatorily restricting the speech of large publishers and enhancing the relative voice of small publishers?

3. By exempting from taxation the first $100,000 of paper and ink consumed annually by each publication, does Minn. Stat. § 297A.14 deny equal protection of the laws and violate the Fourteenth Amendment by effectively imposing a graduated tax on the volume of a publisher's business activity?

4a. Where Minnesota specifically exempts newspapers from sales tax, do the First and Fourteenth Amendments prohibit Minnesota from imposing a special "compensating use tax" under Minn. Stat. § 297A.14 upon the paper and ink consumed by newspapers, in an attempt to avoid the constitutional problems which would be presented by a direct tax on the sale of newspapers?

b. Assuming that a direct tax on the sale of newspapers would be constitutional, do the First and Fourteenth Amendments nevertheless prohibit Minnesota from imposing sales and use taxes which discriminate between large and small newspapers, between domestic and foreign newspaper publishers, between newspaper publishers and other industrial users of paper and ink, and between newspapers and other entities exempt from sales tax, when such discriminatory tax treatment is not necessary to accomplish any compelling state interest?

LIST OF PARTIES

In addition to the parties contained in the caption of this case in this Court, the Minnesota Civil Liberties Union appeared as *amicus curiae* in support of appellant before the Minnesota Supreme Court.

NOTE AS TO ABBREVIATIONS

Throughout this Brief, appellant will use these abbreviations:

"A —" refers to pages in the Appendix to Jurisdictional Statement.

"JA —" refers to pages in the Joint Appendix.

"Motion at —" refers to pages in the Appellee's Motion to Dismiss.

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No. 81-1839

IN THE

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MINNEAPOLIS STAR AND TRIBUNE COMPANY,
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MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

BRIEF OF APPELLANT

OPINIONS BELOW

The Minneapolis Star and Tribune Company ("Star Tribune")[1] appeals from a January 5, 1982, judgment of the Minnesota Supreme Court upholding the constitutionality of Minn. Stat. § 297A.14, which taxes newspapers' consumption of paper and ink in excess of $100,000 per year. The challenged use tax affects only a few publishers of Minnesota's largest daily newspapers; 97 percent of the state's publishers pay no such tax.

[1] Appellant has no parent company. Except for Information Publishers, Inc., a Minnesota corporation, all of its subsidiaries are wholly owned subsidiaries. Appellant is affiliated with the Des Moines Register and Tribune Company by common individual shareholders and by the ownership by the Des Moines Register and Tribune Company of 13% of appellant's outstanding stock. Effective June 1, 1982, the name of Minneapolis Star and Tribune Company was changed to Cowles Media Company. In the interests of clarity and consistency, appellant's prior name will be used throughout this Brief.

The Minnesota Supreme Court's opinion (A-19) is published at 314 N.W.2d 201 and at 7 Media L. Rep. 2579. The opinion of the Hennepin County District Court invalidating the challenged use tax (A-49-66) has not been reported.

GROUNDS OF JURISDICTION

Star Tribune commenced this tax refund action in the Minnesota State courts, specifically challenging the validity of Minn. Stat. §§ 297A.14 and 297A.25 on the grounds that these state statutes are repugnant to the freedom of press and equal protection clauses of the First and Fourteenth Amendments to the United States Constitution. The Minnesota Supreme Court upheld the challenged statutes, reversing a judgment of the Hennepin County District Court which had held the challenged statutes invalid on all grounds asserted.

This Court has jurisdiction by appeal pursuant to 28 U.S.C. § 1257(a). The judgment of the Minnesota Supreme Court was entered on January 5, 1982. (A-66.) Notice of appeal to this Court was duly served on all parties on March 10, 1982, and timely filed in the Minnesota Supreme Court on March 12, 1982. (A-68.) See 28 U.S.C. § 2101(c). This Court noted probable jurisdiction on June 21, 1982. 50 U.S.L.W. 3998.01 (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section One, Fourteenth Amendment, United States Constitution:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

The full text of the relevant Minnesota statutes is set forth in the Appendix (A-70-90). The statutory provision most directly at issue in this appeal is the following paragraph of Minn. Stat. § 297A.14 (1974):

"Notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in Section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section." (A-84.)

STATEMENT OF THE CASE

This appeal involves Star Tribune's claim for a refund of $874,265.04 of use taxes which it paid to Minnesota on paper and ink consumed in producing its newspapers from January 1, 1974, through May 31, 1975. A refund claim was filed with the Sales and Use Tax Division of the Minnesota Department of Revenue on August 5, 1975 (JA-16), and was denied the next day (JA-20). Star Tribune commenced this tax-refund action on August 27, 1975, pursuant to Minn. Stat. § 297A.35 (JA-2).

During 1974 and 1975, Star Tribune published the morning *Minneapolis Tribune* six days a week and on Sunday, and the evening *The Minneapolis Star* six days a week. Both newspapers are "publications" as defined in Minn. Stat. § 297A.25, subd. 1(i), and are Minnesota's two largest-circulation paid-subscription daily newspapers.

History of the Challenged Use Tax

In 1967, Minnesota for the first time imposed a tax on the sale of tangible personal property. (1967 Minn. Laws, 1st Sp. Sess., Ch. 32.) The tax rate began at 3 percent, rose to 4 percent in 1971 (A-74) and to 5 percent in 1981 (A-2, n.1).

Section 14 of the 1967 Act (Minn. Stat. § 297A.14) established a use tax payable on "the privilege of using, storing or consuming in Minnesota tangible personal property," unless the sales tax had been paid on such property. Minnesota explicitly characterizes its use tax as "a compensating or complementary tax." 13 Minn. Code of Agency Rules, Tax S & U 300 (1979).

The 1967 Sales and Use Tax Act specifically and totally exempted, *first*, the sale of publications and the sale of materials used to produce publications, Minn. Stat. § 297A.25, subd. 1 (i); and *second*, the sale of materials used or consumed in the industrial production of personal property intended ultimately to be sold at retail, Minn. Stat. § 297A.25, subd. 1(h). For convenience, Star Tribune will refer to these two exemptions as the "publications exemption" and the "industrial user exemption."

Effective November 1, 1971, the publications exemption was amended to exclude from the exemption paper and ink consumed in producing publications; publications themselves remained tax-exempt. (A-77.) Minnesota thereby imposed a use tax on all such paper and ink. The 1971 Legislature did not change the exemption for industrial users, whose consumption of paper, ink and other products continued to be exempt from any use tax regardless of whether sales of their end products were subject to, or exempt from, the sales tax. "Pub-

lications" was the *only* previously exempt sales and use tax category adversely affected by the 1971 legislation.[2]

Effective January 1, 1974, the publications exemption was again amended so as to impose the use tax on consumption of paper and ink by publications only to the extent that the cost of those products consumed in any calendar year exceeded $100,000 per publication. (A-84.) As a consequence, 97 percent of Minnesota newspaper publishers pay no use tax; only publishers of large Minnesota newspapers—who consume more paper and ink because they publish more pages, more often, to more people—pay any use tax on their consumption of paper and ink.

Effect of the Challenged Use Tax

Extending the use tax in 1971 to paper and ink consumed by newspapers did not generate significant revenue when compared with that year's real revenue-raising measure—raising the tax rate from 3 to 4 percent. In 1974, one of the tax years here in question, the State's sales and use tax revenues totalled $370,116,066 at a 4 percent rate. *See* Minnesota Sales and Use Tax Annual Report 1974 (reproduced in part as Appendix C to Star Tribune's Memorandum in Support of Motion for Summary Judgment). At a 3 percent tax rate, total 1974 revenues would have been $277,587,649. Thus, the tax rate increase pro-

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[2] The 1971 sales and use tax legislation (A-74-81) changed the exemptions from sales and use taxes (Minn. Stat. § 297A.25) only by *eliminating* the exemption previously granted to paper and ink consumed in producing publications (section (i)), by *expanding* the exemption for sales to government bodies (section (j)) and by *modifying*, without materially affecting the scope of, certain exemptions granted to taconite companies, telephone companies, railroads, freight line companies, sleeping car companies, and express companies which were taxed on another basis in lieu of sales and use taxes (sections (l), (m), (n) and (o)).

duced an additional $92,529,016 for the State in 1974. In contrast, the challenged use tax on paper and ink produced only $893,355 for the State in 1974 (A-5, n.4), less than 1 percent of the revenue from increasing the sales tax rate, and less than 1/4 of 1 percent of total sales and use tax revenues that year.

The challenged use tax contributed relatively little to the State's total receipts of $3.67 billion for the fiscal year ending June 30, 1975. *See* Budget Message of Governor Rudy Perpich to the 70th Session of the Minnesota State Legislature (January 25, 1977). Revenues from the challenged use tax were barely noticeable even as a percentage of the State's budget *surpluses* of $224 million for fiscal year 1973-74 and of $403 million for fiscal year 1974-75. *See State has $224 million budget surplus,* Minneapolis Tribune, August 23, 1974, at A1; *State ends fiscal year with expected surplus,* Minneapolis Tribune, September 13, 1975, at B7.

Although the challenged use tax made at most a trifling contribution to the State's coffers, it had a dramatic effect upon a few of the taxpaying newspaper publishers, particularly Star Tribune. In 1974, Star Tribune alone paid $608,634 in use taxes on paper and ink. (A-5, n.4.) Its 1974 corporate income taxes, payable on net income and therefore reflecting its relative profitability, totalled only $1,000,000; it paid the State real estate taxes of only $355,000. (JA-12.) These figures demonstrate that the "sting" of the challenged use tax is, intentionally or unintentionally, substantial.

Only a few Minnesota newspaper publishers felt the sting of the tax after 1973, due to the $100,000 exemption. During 1974 and 1975, approximately 400 paid-circulation newspapers were published in Minnesota. Approximately 90 percent had publication schedules of twice a week or less; none of these newspapers consumed $100,000 of paper and ink in either

year, and thus none paid any use tax on its consumption of paper and ink. In each year, 29 daily newspapers were published in Minnesota, six in the three largest metropolitan areas (Minneapolis, St. Paul, and Duluth). In 1974, only 11 publishers of those daily newspapers paid a use tax on paper and ink; in 1975, only 13 did so. In both years, Star Tribune paid nearly two-thirds of all use taxes collected from Minnesota newspapers.[3]

Thus, during 1974 and 1975, the use tax in question was imposed upon only 3 percent of all Minnesota newspaper publishers. During those years, no daily newspaper with a circulation of less than 12,500 paid any use tax, while all but one daily newspaper with a circulation greater than 12,500 paid some use tax in one year or the other. Among those paying any tax, the amounts of use tax paid in 1974 varied widely, from $608,634 paid by Star Tribune to $120 paid by the *Fergus Falls Daily Journal*. (A-5-6, nn. 4, 5.)

Proceedings Below

On May 30, 1980, Hennepin County District Judge Donald T. Barbeau granted Star Tribune's motion for summary judgment, holding the challenged tax unconstitutional as an abridgement of freedom of the press and as a denial of equal protection under both the United States and the Minnesota constitutions. He concluded:

> The challenged use tax is not . . . a tax of general application. It is a limited, special tax, in its effect in the

[3] During calendar year 1974, Star Tribune paid $608,634 of the $893,355 in total taxes collected, or 68 percent. (A-5, n.4.) During calendar year 1975, Star Tribune paid $636,113 of the $944,055 in total taxes collected, or 67 percent. (A-6, n.5.)

nature of a license tax, which abridges the freedom of the press in four ways:

First, it taxes a select group of Minnesota publishers, leaving other Minnesota publishers free of its burden. This effect results from the $100,000 exemption.

Second, it is specifically and exclusively directed at publications in general; no other industrial users of paper and ink products are subject to this use tax.

Third, its direct tendency, if the tax is to be avoided, is to restrict circulation and thereby reduce the dissemination of information to the general public.

Fourth, it is the practical and legal equivalent of a direct tax on the exercise of a First Amendment right because of its special and limited impact. (A-65-66.)

The State appealed, and the Minnesota Supreme Court reversed. (A-1-19.) That court characterized the tax as an ordinary form of taxation for the support of government, whose classifications were justified by the compelling government purpose of revenue-raising. It stated:

The history and setting of section 297A.14 . . . reveal that it is not a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers distributed by publishers such as Star Tribune. It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota. Unlike the type of tax found to be unconstitutional in *Grosjean* [*v. American Press Co.*, 297 U.S. 233 (1936)], sales and use taxes are now commonplace and readily accepted. (A-12.)

The Minnesota Supreme Court justified the discriminatory use tax classification between newspaper publishers and non-publishers on the ground that most goods produced by non-publishers are subject to retail sales tax, whereas newspapers are statutorily exempt from any retail sales tax. The court speculated that this arrangement "may be a result of the difficulties and expense of collecting sales tax upon sales of such low-priced items [publications]." (A-13.)

Having concluded that the use tax on publications' consumption of paper and ink "is constitutionally justified . . . as a revenue-raising measure," the court held that the "$100,000 exemption itself is justified if it is an integral part of the sales and use tax system." (A-17.)

SUMMARY OF ARGUMENT

This appeal concerns the constitutionally permissible nature and extent of taxation upon the expressive activity of newspapers. Within its general sales and use tax laws, the State of Minnesota has created a special tax paid only by Minnesota publishers of large daily newspapers. The result abridges freedom of the press and denies equal protection of the laws, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Minnesota's method of abridging press freedom can trace its origins back more than 250 years, but the "tradition" is far from noble. Most States have been extremely wary of enacting such discriminatory and censorial taxes on newspapers' expressive activity. The challenged use tax on paper and ink is, in all its peculiarities, unique; no other State imposes this precise tax, although Iowa has a similar tax on paper and ink without the $100,000 per-publication exemption

feature. *See* Iowa Code §§ 422.42, 423.1 (1981). Most States have chosen to exempt newspapers from their sales and use taxes. Whether because of doubts as to the constitutionality of a sales tax on newspapers, because of recognition of the important public policy of encouraging the circulation of information, because of public distaste for a sales tax on newspapers[4] or because of the political effectiveness of a united press, only 16 States impose even a limited sales or use tax upon any aspect of newspaper publishing, be it advertising, circulation, or consumption of newsprint. Presstime, December 1981 at 16.

This longstanding State sensitivity to First Amendment values is pressured constantly by revenue needs (particularly in troubled economic periods) and by public and/or legislative irritation at certain elements in the press. Minnesota's use tax reflects a subtle and dangerous effort to neutralize normal political opposition to a new tax on the press. Imposing a use tax on paper and ink rather than a sales tax on newspapers partially disguises the impact of the tax and mutes adverse

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[4] The following colloquy occurred at oral argument before the Minnesota Supreme Court (A-34-35):

> "Justice Otis: What's the apparent reason for exempting newspapers from that [sales tax]?
>
> "Mr. Kempainen: Many reasons can come into effect, Your Honor. First of all, this is the United States of America, we have a long history in this country of respecting the freedom of the press, and just on that ground alone and the political unpopularity of imposing a sales tax upon the sale of an actual newspaper would be ground enough, we believe, for any State Legislature to exempt that sales tax. There are other grounds which I have mentioned in my brief. . . . Perhaps the Legislature just sought to encourage the dissemination of news. . . ."

reaction by the reading public.[5] The $100,000 exemption removes any use tax burden from most Minnesota publishers, including the small and rural newspapers which often have significant influence upon individual legislators. Unless the Minnesota use tax is invalidated, other States may be tempted to follow Minnesota's example, thereby spreading this discriminatory burden on the publishers of large newspapers.

J. Edward Gerald, professor of journalism and mass communications at the University of Minnesota, anticipated this sort of discrimination more than three decades ago. Speaking from his experience as manager of the Missouri Press Association, he warned:

> If the metropolitan newspapers, whose size and resources make them especially annoying to legislative leaders during periods of controversy, could be separated under the Constitution from their smaller but more numerous country cousins, they would be at the mercy of legislators who feel either thwarted or persecuted by the newspapers; and any action taken would probably spring not from statesmanship but from human irritation.

J. Gerald, *The Press and the Constitution* 103 (1948); *see also* J. Gerald, *The British Press Under Government Economic Controls* 206 (1956) (same effect noted in England). During its most recent Term, in another case rooted in Minnesota legisla-

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[5] This factor was noted during oral argument before the Minnesota Supreme Court (A-35):

> "Justice Otis: But the Legislature didn't seem inhibited when it came to income taxes and property taxes.
>
> "Mr. Kempainen: That's correct, Your Honor, perhaps because the sales tax is imposed more directly upon the actual consumer as he buys his newspaper. You would actually have to fork over the tax at the same time that he buys the newspaper, whereas the property tax and the income tax and any other form of taxation is more indirect. . . ."

tion, this Court reaffirmed the broad principle stated by Justice Jackson: "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Larson v. Valente*, 50 U.S.L.W. 4411, 4416 (1982), *quoting Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

Because the challenged use tax inhibits press activity clearly protected by the First Amendment, its classification scheme must be subjected to strict and exacting scrutiny. The Minnesota Supreme Court correctly identified the applicable standard of review, but misapplied it. That court did not address the essential issue of whether the discriminatory classifications of the challenged use tax were necessary to accomplish what it characterized as the "compelling government purpose of revenue-raising." (A-1.) In its Introduction, Star Tribune will address this analytical failure of the Minnesota Supreme Court.

In Part I of this Brief, Star Tribune will argue that the challenged use tax imposed only on paper and ink consumed by newspapers is invalid on its face because it takes one of the three classic forms of the odious "taxes on knowledge"—a tax on paper. Because of the history, necessary effect and potential for abuse of such taxes, proof of specific punitive or censorial legislative intent is unnecessary in order to declare the challenged use tax unconstitutional as an abridgement of freedom of the press.

By exempting the first $100,000 of paper and ink consumed by each publication annually, the 1973 amendment to the challenged use tax freed 97 percent of the State's publishers from any use tax burden whatsoever, and subjected publishers of

large newspapers to a steeply graduated effective rate of tax. Parts II and III of this Brief will argue that the challenged use tax unconstitutionally discriminates against the expressive activities of publishers of large newspapers thereby abridging freedom of the press, and imposes a graduated tax on the business activity of these publishers which bears no relation to a given taxpayer's profitability, thereby denying equal protection of the laws.

Part IV of this Brief will challenge two central assumptions critical to the Minnesota Supreme Court's decision: first, that a tax imposed directly on the sale of newspapers would withstand constitutional scrutiny, and second, that the burden which the challenged use tax imposes on the publishers of large Minnesota newspapers (in the absence of a tax on the sale of newspapers) corresponds to that which a sales tax would impose. This Court need not address the issue of the constitutionality of a sales tax on newspapers (which Minnesota has *not* imposed) in order to invalidate the challenged use tax on paper and ink (which Minnesota imposes only on publishers of large newspapers). However, because of the Minnesota Supreme Court's approach to upholding the challenged use tax, Part IV-A of this Brief will argue that such a sales tax would fall directly upon a newspaper's expressive activity and therefore would abridge freedom of the press. Part IV-B will assume, *arguendo*, that a tax on the sale of newspapers would be constitutional, but will argue that the challenged use tax so distorts normal sales and use tax principles that it unconstitutionally discriminates against, and among, newspaper publishers.

ARGUMENT

Introduction: The Minnesota Supreme Court Misapplied the Constitutional Standard of Strict and Exacting Scrutiny.

The Minnesota Supreme Court approached each of Star Tribune's objections to the challenged use tax with a skewed understanding of the appropriate legal standard of review, and repeatedly deferred to a perceived legislative discretion despite the tax's impact on First Amendment rights.[6] It gave no more than lip service to the appropriate standard of constitutional review.

Taxation and regulation which infringe First Amendment rights are subject to strict and exacting judicial scrutiny. *Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4073 (1981) ("regulation of First Amendment rights is *always* subject to exacting judicial scrutiny") (emphasis added); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 99, 101 & n.8 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The State may justify limitations on First Amendment rights or discriminatory classifications under this standard only by showing that they are necessary or essential to accomplish a compelling state interest. *United States v. Lee*, 50 U.S.L.W. 4201, 4203 (1982); *Police Department of City of Chicago v. Mosley, supra* at 99; *In re Griffiths*, 413 U.S. 717, 721-22 (1973).

The challenged use tax obviously interferes with First Amendment rights. The communication of ideas lies at the

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[6] First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *NAACP v. Claiborne Hardware Co.*, 50 U.S.L.W. 5122, 5128 n.43 (1982); *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936).

very core of First Amendment activity. Newspaper publishers can increase the flow of information to the public by publishing more pages, by increasing the frequency of publication or by increasing circulation. Each of these activities is protected by the First Amendment.[7] Each requires increased consumption of paper and ink. By taxing the consumption of paper and ink, and by increasing the effective rate of tax as such consumption increases (A-90-92), the State directly interferes with First Amendment activity.

At oral argument before the Minnesota Supreme Court, counsel for the State conceded that "it would be very difficult to uphold this particular statute under the strict scrutiny standard of review." (A-29, 34.) Understandably, then, the State contended and continues to contend that the challenged use tax should not be subject to strict scrutiny at all because it is "a part of Minnesota's general system of nondiscriminatory sales and use taxation," and thus does not "impermissibly interfere" with newspapers' fundamental constitutional rights. (A-28-30; Motion at 16, 17.) The State might argue with equal logic that statutes forbidding publication of the names of rape victims disclosed in public records, or of juvenile offenders, are exempt from close judicial review as "part of a general criminal code" or that libel laws are similarly immune from constitutional analysis as "part of the State's general system of tort law." This Court consistently has shown itself to be more sensitive to such constitutional questions. *See,*

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[7] The Minnesota Supreme Court appears to have assumed that only increasing circulation was protected activity. (A-15-16.) That assumption is mistaken. For example, in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), this Court held that the First Amendment prohibited governmental regulation of editorial decisions on the *size* as well as the content of a newspaper.

e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (names of rape victims); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (names of juvenile offenders); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel).

The Minnesota Supreme Court rejected the State's argument on this point and recognized its duty to subject the challenged use tax to strict and exacting scrutiny. (A-8, 12.) However, it misapplied the test. It was all too deferential to the State's claim that the challenged use tax had no censorial purpose, and was simply a revenue-raising measure. (A-12.) Although the record contains no evidence of direct statements of punitive intent by the responsible legislators,[8] close analysis of the history and effect of the challenged use tax casts serious doubt upon the suggested "compelling government purpose of revenue-raising" (A-1) as the true purpose of the legislation. See pp. 4-7 above.

The Minnesota Supreme Court simply failed to apply the full test of strict and exacting scrutiny. It never addressed the question of whether the discriminatory classifications of the challenged use tax were necessary to further the general purpose of raising revenue. Rather, the Minnesota Supreme Court concluded its "strict scrutiny" analysis with the general observation: "There is no reason to believe that this legislative choice [of a use tax on paper and ink rather than a sales tax on newspapers] is insufficiently tailored to achieve the goal

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[8] Star Tribune's Complaint does allege: "In actual fact, by virtue of the size of the exemption, the tax involved herein was intended by the Legislature to be paid by only a small number of the largest newspapers in the State of Minnesota, and the $100,000 exemption figure accomplished just such a result." (JA-6.) Star Tribune does not agree with the State's suggestions that the legislative motives were pure and benign (see Motion at 6, 8, 10-11).

of raising revenue." (A-13.) That approach is a far cry from this Court's standard, which places a burden on the State to prove that the challenged use tax is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 50 U.S.L.W. 4759, 4762 & n.17 (1982).

The Minnesota Supreme Court's uncritical deference to broad legislative discretion to raise revenue as it sees fit would shield almost any tax on the press from successful judicial challenge, for all taxes raise some revenue, even though revenue-raising may not necessarily be the primary purpose or effect of every tax. Properly applied, strict and exacting scrutiny requires a close examination of the details, as well as the general thrust, of the challenged scheme of regulation or taxation. States may not raise revenue in ways which unduly infringe upon First Amendment activities. The State failed to meet its burden of establishing that each aspect of the challenged use tax was necessary to accomplish a compelling state interest, and so the tax cannot be upheld under the constitutional standard which the Minnesota Supreme Court purported to apply.

I. The Challenged Use Tax Abridges Freedom of the Press by Imposing a Classic "Tax on Knowledge" in Violation of *Grosjean v. American Press Co.*

The form and impact of the Minnesota use tax here at issue are strikingly similar to those of the Louisiana license tax which this Court invalidated in *Grosjean v. American Press Company*, 297 U.S. 233 (1936). In *Grosjean*, 13 newspapers were subject to a 2 percent license tax on gross receipts derived from advertising, while at least 124 Louisiana news-

papers paid no such tax, because the tax applied only if a newspaper's weekly circulation exceeded 20,000. *Id.* at 241. In the present appeal, approximately 3 percent of all newspaper publishers in Minnesota paid the challenged use tax in annual amounts varying from $120 to $636,113, while the remaining 97 percent, with circulations of 12,500 per day or less, paid no use tax. (A-4-7.) Here, as in *Grosjean*, small rural publishers pay no tax, while large metropolitan publishers shoulder virtually the entire tax burden.

In *Grosjean*, this Court invalidated the tax there at issue as an unconstitutional abridgement of freedom of the press. Its form demonstrated the Louisiana license tax to be a successor to the English and early American efforts to censor or control the press by taxation. 297 U.S. at 245-51. The history of these "taxes on knowledge" is recounted in the *Grosjean* opinion, as well as in such works as C. Collet, *History of the Taxes on Knowledge* (1899); C. Duniway, *The Development of Freedom of the Press in Massachusetts* 119-20, 133-37 (1906); 2 T. May, *Constitutional History of England* 107-08, 172, 213-15 (1891); F. Siebert, *Freedom of the Press in England 1476-1776* 306-22 (1952). *See also* Appellee's Brief at 48-70, *Grosjean*.

These sources describe the three principal forms of the taxes on knowledge:

> (1) A tax on newspapers and pamphlets, at a flat rate per copy, and collected by means of a stamp. The amount of tax varied with the number of pages in the publication; in some cases, the early English stamp tax nearly doubled the price of the newspaper. 1 Collet, *supra* at 18.
>
> (2) A tax on advertisements appearing in newspapers published at specified frequencies (originally weekly or more frequently), at a fixed amount per advertisement.

(3) Taxes on paper, at a fixed amount per ream. The amount of tax varied depending upon whether the paper was imported or domestic, and depending upon the quality of the paper.[9]

These sources also chronicle the intense popular opposition to all such taxes on the ground that they impaired the dissemination of information.

Resistance to these censorial taxes played a substantial role in the adoption of the First Amendment. One of the most telling criticisms of the proposed Constitution was the lack of a formal bill of rights, and ratification of the Constitution in several key states was made contingent upon an agreement to add such a bill as soon as the new government got underway. C. Stevens, *Sources of the Constitution of the United States* 213 (1927). Therefore, the Anti-Federalist writings, rather than the Federalist writings, are "the more influential" on the bill of rights issue. 1 B. Schwartz (ed.), *The Bill of Rights: A Documentary History* 527 (1971).

Federalists recognized the necessity of a free press, but argued that the federal government was given no express power over the press and therefore a declaration of press freedom was unnecessary. *See, e.g.*, 1 Schwartz, *supra* at 439, 454, 529. In response, Anti-Federalists were quick to point to Congress's powers of taxation as a specific potential threat to a free press. *Id.* at 474, 576; L. Levy (ed.), *Freedom of the*

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[9] In addition, the Stamp Act of 1712 (10 Anne, c.19) imposed taxes on imported linen and soap. 1 Collet, *supra* at 8. By the State's apparent reasoning, this would render the Stamp Act "general legislation," immune from constitutional attack. That result of course is untenable and merely emphasizes the weakness of the State's position, because the First Amendment in large part sprang from the Framers' vehement opposition to the Stamp Act. *Grosjean v. American Press Co.*, 297 U.S. at 248-49.

Press from Zenger to Jefferson 143-44 (1966); J. McMaster & F. Stone (eds.), *Pennsylvania and the Federal Constitution 1787-1788* 181 (1888); *cf. id.* at 570-71, 580-81.[10]

The Framers even witnessed a demonstration of how constitutional guarantees of freedom of the press could be used to obtain repeal of objectionable taxes on newspapers. In 1780, Massachusetts had adopted a constitution which included a declaration in favor of an unrestricted, but undefined, freedom of the press. Duniway, *supra* at 133-136. "The first public debate about the practical significance of the new constitutional guarantee arose in 1785, over a state law of that year imposing a stamp tax on all newspapers and almanacs." *Id.* at 136. Although the tax appeared to be purely a revenue measure, it was denounced as an unconstitutional limitation on freedom of the press and was repealed in 1786; an advertisement tax levied to replace the income lost from repeal of the stamp tax likewise was attacked as an unconstitutional hindrance to free development of the press, and was repealed in 1788. *Id.* at 136-37. At least one Anti-Federalist alluded to the Massachusetts situation in the course of his arguments for a bill of rights. McMaster & Stone, *supra* at 181.

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[10] Alexander Hamilton alone among Federalists or Anti-Federalists appears to have argued that taxes on newspapers would not abridge liberty of the press: "We know that newspapers are taxed in Great Britain, and yet it is notorious that the press no where enjoys greater liberty than in that country." 1 Schwartz, *supra* at 582 n.1. Hamilton's statement is "wholly unconvincing," Levy, *supra* at 144; Collet and the other sources cited at p. 18 above provide ample refutation of the claim that the English taxes had no ill effect on freedom of the press. The American intention was to reject the taxes which were imposed upon the English press. The Framers of the First Amendment were familiar with the English struggle to repeal the obnoxious taxes and with the "general adverse sentiment of the colonies" concerning those taxes. *Grosjean v. American Press Co.*, 297 U.S. at 248. In short, Hamilton lost this argument.

In light of history, this Court unanimously concluded in *Grosjean* that the First Amendment was intended to, and did, prevent government from restraining freedom of the press through the "taxes on knowledge" previously utilized in England and in some of the colonies. 297 U.S. at 248-49. This Court recognized that the very form of the taxes on knowledge renders them unconstitutional. 297 U.S. at 250.

The Louisiana tax in *Grosjean* combined the first two classic forms of taxes on knowledge. It directly taxed advertisements, and it indirectly taxed the circulation of newspapers by tying the applicability of the advertisement tax to a certain level of circulation. Minn. Stat. § 297A.14 embodies the third classic form of taxes on knowledge—a tax on paper. Historically, a tax on paper was no less objectionable than a newspaper stamp tax or a tax on newspaper advertising.[11] The Minnesota tax also penalizes increased circulation because it applies only when consumption of paper and ink, and hence circulation, exceed a certain level.

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[11] 2 May, *supra* at 215 ("Cheapness and expansion were evidently becoming the characteristics of the periodical press; to which every tax, however light, was an impediment. Hence a new movement for the repeal of all 'taxes on knowledge,' led by Mr. Milner Gibson, with admirable ability, address, and persistence. In 1853, the advertisement duty was swept away; and in 1855, the last penny of the newspaper stamp was relinquished. Nothing was now left but the duty on paper; and this was assailed with no less vigor. Denounced by penny newspapers, which the repeal of the stamp duty had called into existence; complained of by publishers of cheap books; and deplored by the friends of popular education, it fell, six years later, after a parliamentary contest memorable in history. And now the press was free alike from legal oppression and fiscal impediments.") (footnote omitted). *See also Taxes on Knowledge*, Edinburgh Review, October, 1835, at 126-32. For a more recent analysis of the central importance of paper to newspaper publishing, *see generally* J. Gerald, *The British Press Under Economic Controls* (1956).

The Minnesota Supreme Court attempted to distinguish *Grosjean* by referring to the history and setting of the Louisiana gross receipts tax on newspaper advertising revenues, namely that the tax apparently had been enacted to penalize large newspapers that were political opponents of Governor Huey Long. (A-9-10.) However, *Grosjean* contains only a single veiled reference to the "present setting" of the Louisiana tax, 297 U.S. at 250; the primary reason for invalidating the tax was the lengthy history and potential of abuse of such taxes in general, and not the specific punitive intent of the particular Louisiana tax in question. *See also City of Tampa v. Tampa Times*, 153 Fla. 709, 15 So.2d 612, 613 (1943).

Subsequent decisions of this Court have confirmed that the basis of *Grosjean* was the tax's necessary effect and potential for abuse, and not the presence of a punitive legislative intent. In *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), this Court noted that "the license tax in *Grosjean v. American Press Co.* . . . was held invalid because of its direct tendency to restrict circulation." In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court stated that *Grosjean* stands,

> not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in Grosjean the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose just such a tax.

Id. at 384-85. And in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court unanimously stated:

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action . . . Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived *to have the consequence* of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. *Grosjean v. American Press Co.*

Id. at 461-62 (emphasis added).

Such readings of *Grosjean* are consistent with decisions of this Court in other contexts holding that proof of specific punitive intent is not a prerequisite to invalidating legislation which deters the exercise of First Amendment rights. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963). This emphasis upon the *effect* of legislation is vitally important, because specific legislative intent may be ambiguous or impossible to prove in such cases. T. Emerson, *The System of Freedom of Expression*, 413-14 (1970).

If a tax takes the form of one of the three classic "taxes on knowledge," efforts to justify the tax purely as a "revenue-raising measure" are both suspect and insufficient. The earliest efforts to control the press through taxation used the guise of raising revenue. Proponents of the Stamp Act of 1712 touted it as a way to keep newspapers in hand and at the same time to help raise the large supplies of money necessary for Queen Anne to fight the War of the Spanish Succession. Stewart, *John Lennox and The Greenock Newsclout: A Fight Against the Taxes on Knowledge*, 15 Scottish Historical Rev. 322, 326-27 (1918); J.B. Williams, *History of*

English Journalism (1908), *quoted in Grosjean v. American Press Co.*, Appellee's Brief at 49-50; Siebert, *supra* at 309. The English government subsequently opposed efforts to repeal those taxes because of the revenue loss which repeal would cause. *See, e.g.*, 1 Collet, *supra* at 167-68; 2 *id.* at 67, 73, 96-97, 119-34. Professor Gerald noted that the newspaper stamp duty and the special tax on advertising in England "were a part of ordinary revenue measures; the position of the government was that the press, as a business, should pay its fair share of taxes." J. Gerald, *The British Press Under Government Economic Controls* 6 (1956). Whatever their intent, the English taxes on knowledge retarded the establishment of mass-circulation newspapers. *Id.* at 5-6; Stewart, *supra* at 326.

In America, the First Amendment was adopted to protect the press against the taxes on knowledge, despite the revenue which such taxes raised. *Grosjean v. American Press Co.*, 297 U.S. at 249. The tax which this Court invalidated in *Grosjean* had been described by its sponsors as a measure to make newspapers pay a "license to do business like everybody else does." *See* Transcript of Record at 47, *Grosjean*. As this Court has noted, "taxes on circulation solely for the purpose of revenue were successfully resisted, prior to the adoption of the First Amendment, as interferences with freedom of the press. Surely all this was familiar knowledge to the framers of the Bill of Rights." *Jones v. City of Opelika*, 316 U.S. 584, 616-17 (1942) (Murphy, J., dissenting), *adopted as a majority opinion*, 319 U.S. 103 (1943).

It does not matter whether the tax was enacted solely to raise revenue or whether the revenue-raising was a mere pretense to disguise an intent to punish, control or restrain the press. Through the First Amendment, America has rejected

the "taxes on knowledge," on the grounds that they unacceptably and significantly interfere with the dissemination of information to which the public, as the true sovereigns of the nation and its several States, are entitled. A tax on paper and ink consumed in publishing newspapers is, by its very nature and by its historical roots, an unconstitutional tax on knowledge.

II. The Challenged Use Tax Restricts the Speech of Large Publishers and Conflicts With *Buckley v. Valeo* and Similar Decisions of This Court.

The challenged use tax applies only when annual per-publication consumption of paper and ink exceeds $100,000. The size of the exemption relieves publishers of small newspapers from most or all of the tax, while subjecting a few publishers of large daily newspapers to substantial tax liability. Apart from an opaque reference to the need for "economically sound taxes" (A-17), the Minnesota Supreme Court suggested no justification for the discriminatory classifications of large and small newspaper publishers. It alluded to, but did not specifically endorse, the State's suggestion that the $100,000 exemption "may be justified as a legislative policy to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered)." (A-17.) *Mabee* is readily distinguishable because the particular provision of the Federal Fair Labor Standards Act there involved "was inserted to put those papers [small weeklies and semi-weeklies] more on a parity with other small town enterprises." 327 U.S. at 184. In contrast, Minnesota's general sales and use taxes contain no such broad "small enterprise" exemption.

The purpose of the challenged use tax can be no broader than its actual effect: it favors publishers of small newspapers and penalizes publishers of large newspapers. In the present context, either effect is unconstitutional. The First Amendment not only prevents the State from burdening the entire press with a tax not borne by other businesses, it also bars the State from singling out particular segments of the press for special favors or penalties relating to expressive activity.[12] If such favoritism is the purpose of the $100,000 exemption (as the State itself suggests, Motion at 25-27), that purpose is unconstitutional.

In *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976), this Court struck down provisions of the Federal Election Campaign Act which imposed $1,000 limits on "independent expenditures" to advocate the election or defeat of "clearly identified candidates" for federal office. This Court rejected arguments that the government had a legitimate interest in equalizing the relative ability of individuals and groups to influence the outcome of elections, and stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." (424 U.S. at 48-49.)

In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), this Court rejected the argument "that the State may control the volume of expression by the wealthier, more power-

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[12] To the extent that the challenged use tax takes the place of a sales tax on newspapers (A-13), it corresponds to a special tax on the sale of large-circulation daily newspapers, and not to a tax on the sale of all newspapers. *Grosjean* prohibits such a special tax, as a prior Minnesota Attorney General readily recognized. Minn. Atty. Gen. Op., No. 90, at 160, 161 (1948).

ful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members." *Id.* at 791 n. 30. *Accord, Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4072 (1981); *cf. Larson v. Valente*, 50 U.S.L.W. 4411, 4415-16 (1982).

These constitutional principles would prohibit Minnesota from forbidding a publication from consuming more than $100,000 of paper and ink annually. The challenged use tax admittedly does not go that far, which apparently prompted the Minnesota Supreme Court to distinguish *Buckley* by stating:

> By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount. (A-19.)

However, the constitutional principles espoused in *Buckley* and *First National Bank* go beyond outright prohibition. It is just as unconstitutional for government to *inhibit* the circulation of information by taxation as it is to *prohibit* the circulation outright, as *Grosjean v. American Press Co.* established.

The State suggests that the $100,000 exemption is "not unlike" the limited political contribution tax credit allowed against the federal income tax by 26 U.S.C. § 41. (Motion at 23 n.10, 27.) The State's argument misconstrues the nature of First Amendment protections. Income taxes are not imposed upon expressive activity; they are imposed upon accumulated income. If a taxpayer spends part of that income upon expressive activity, the government need not subsidize that choice through deductions from gross income and may require the taxpayer to pay for those activities entirely out of his own pocket, provided that the denial of any deduction is nondis-

criminatory. *See Cammarano v. United States*, 358 U.S. 498, 513 (1959). Thus, if Star Tribune spends some of its income to purchase paper and ink, the First Amendment does not require the State to allow those expenditures as deductions from its gross income—unless such a denial of deduction would discriminate against a newspaper's ordinary business expenses as compared with other similarly situated taxpayers' deductible business expenses. But this treatment of business expenses is very different from the State imposing an additional financial burden directly upon expressive activity—for example, by creating a separate tax on political contributions or, as here, by directly increasing a newspaper's cost by levying a use tax on the consumption of those two raw materials (paper and ink) which comprise a published newspaper. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo*, 424 U.S. at 49. The challenged use tax creates a burden based upon just such improper financial factors.

It is not surprising that Minnesota's general sales and use tax laws are the setting for a special tax which is borne only by publishers of Minnesota's large newspapers. Sales and use taxes are particularly susceptible to discriminatory adjustment. General revenue-raising measures such as income taxes, real property taxes, and gasoline taxes legitimately can be refined through classifications and exemptions, but do not lend themselves to easy discrimination against particular classes of users, such as newspaper publishers, because such discrimination would require blatant departures from the basic classifications of such taxes. Income may be taxed progressively based upon ability to pay, but no one would suggest that the

State selectively could tax the income of journalists for daily newspapers at a different rate than other taxpayers. The State may choose to apply different property tax rates to residential and industrial property, but it could not hope to tax the real property of newspaper publishers differently than other property. At oral argument before the Minnesota Supreme Court, Justice Peterson posited a gasoline excise tax "made applicable only to publication companies that used in excess of a certain number of gallons of gasoline." (A-30.) The State's counsel conceded, in effect, that such a tax would be patently unconstitutional. (*Id.*)

By contrast to the broad categories utilized in such other taxes, sales and use taxes by their very nature classify and exempt according to narrowly specified categories of uses. The State insists that it "is not constitutionally constrained to exempt all items of property from taxation, or none at all." (Motion at 22.) Minnesota has chosen to exercise this discretion in great detail: It exempts bowling shirts, but not bowling shoes; bathing suits, but not skin-diving suits. 13 Minn. Code of Agency Rules, Tax S & U 407B (1979). It chose to wait more than a decade after its 1971 "search for additional statewide revenue" (Motion at 13) before taxing the sale of candy bars and soft drinks. 1982 Minn. Laws, Ch. 641, Art. 2, § 5 subds. 1(a)(i) & (ii). The Legislature has not restricted its choices to taxation or total exemption from tax, but has established special tax rates. When it raised the general sales tax rate to 5 percent in 1981, "sales of farm machinery" remained subject to the former 4 percent rate. Minn. Stat. §§ 297A.02, 297A.14 (1981 Supp.) By exempting the first $100,000 of paper and ink consumed by newspapers, the State imposed a steeply graduated effective rate of use tax paid by newspapers (*see* A-90-92), while all other taxpayers pay a uniform

rate (of 5, 4, or 0 percent, depending upon type of purchase) on all purchases. Such discriminatory classifications may be acceptable in other contexts, but not when they imperil First Amendment rights. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 n.3 (1973); *cf. Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (usual deference to broad legislative discretion in tax cases is not appropriate when tax measure is challenged as undue burden on activity granted special constitutional recognition).

The State defends the challenged use tax as an ordinary tax which is "an integral part of Minnesota's general sales and use tax law." (Motion at 7.) This defense is deceptive. Although the State disavows any authority to raise the rate of tax paid by newspapers above the rate paid by other businesses (Motion at 7 n.4), it asserts the authority to impose a tax directly upon expressive activity and then, *solely as a matter of legislative grace*, to exempt some expressive activity entirely, to exempt other expressive activity in part, or to tax different expressive activities at different rates; and to do so without having to justify its choices in court. (*See* Motion at 21-22.) The potential in such asserted authority for rewarding friends and punishing enemies represents sophisticated censorial control beyond that present in the original Stamp Act.[13] Such taxes are not, and must not be, among the "ordi-

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[13] "[T]he tax of 1712 fell most heavily upon the printers and writers who supported the government and who were therefore more or less compelled to pay the tax. While the Tory party seemed willing to sacrifice the presentation of its own side of political controversies in order to kill off the literature of the opposition, the ministers were somewhat astonished to discover that the loyal journals were suffering under the tax and that the opposition publications were avoiding it." Siebert, *supra* at 317.

nary forms of taxation for support of the government" which *Grosjean* permits to be imposed upon the press, 297 U.S. at 250.

As a result of the $100,000 exemption, Minnesota imposes the heaviest use tax burden upon those newspapers which communicate the most information. As with the expenditure ceilings involved in *Buckley v. Valeo*, the challenged use tax restricts the extent of virtually every means of communicating additional information, whether by increasing the number of pages, copies or issues. "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. at 19. The restriction is unconstitutional whether it takes the form of an absolute ceiling on spending, as in *Buckley*, or of a tax penalty when spending on communication exceeds a certain level, as in the present appeal. It is the fact of the improper burden, and not its magnitude, that is the constitutionally objectionable factor. L. Tribe, *American Constitutional Law*, § 16-8 at 1005 n.18 (1978). The classification itself is improper, and so the tax must fall.

III. The Challenged Use Tax Denies Equal Protection of the Laws by Imposing a Graduated Tax on Business Activity, and Conflicts with *Stewart Dry Goods v. Lewis*.

As the Minnesota Supreme Court acknowledged, the "practical effect of this [$100,000-per-publication] exemption during 1974 and 1975 was to relieve from payment of use tax all but a dozen or so publishers." (A-14.) The challenged use tax establishes two rates of taxation for otherwise identical First

Amendment activities, depending only upon the amount of a publisher's prior consumption of paper and ink. The $100,000 exemption also produces a steeply graduated effective rate of use tax on a publisher's total consumption of paper and ink. Star Tribune, publisher of Minnesota's two largest daily newspapers, paid tax on its total use of paper and ink at the overall rate of 3.95 percent, while the second-largest publisher paid at the rate of 3.85 percent, the two next-largest publishers at about 3.33 percent, and the smallest publisher paying any tax at all paid at an effective overall rate of 0.117 percent—all under an ostensibly flat rate 4 percent tax. (A-90-92.)

This Court has held that the gross sales of a merchant do not bear a constant relation to its net profits, and a graduated sales tax therefore unconstitutionally denies equal protection of the laws. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 558, *reh. denied*, 295 U.S. 768 (1935). Similarly, a merchant's gross expenses—such as a newspaper publisher's purchases of paper and ink—do not bear a constant relation to its net profits. The recent failures of major daily newspapers in such cities as Washington and Philadelphia illustrate the principle that a large-circulation newspaper is not necessarily a profitable newspaper. *See Washington Star Is to Shut Down After 128 Years*, The New York Times, July 24, 1981, at 1, col. 2; *Philadelphia's Bulletin, 1847-1982*, Newsweek, February 8, 1981, at 95, col. 2.

Although in 1939 it had endorsed the reasoning of *Stewart Dry Goods*,[14] the Minnesota Supreme Court rejected it here, stating:

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[14] In *National Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360 (1939), *vacated and remanded*, 309 U.S. 551, *affirmed on remand*, 208 Minn. 607, 294 N.W. 230 (1940).

> Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets. Rather, the use tax is constitutionally justified . . . as a revenue-raising measure. The $100,000 exemption itself is justified if it is an integral part of the sales and use tax system. (A-17.)

Such semantic distinctions are squarely contrary to this Court's reasoning in *Stewart Dry Goods*: "In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect." 294 U.S. at 555. Moreover, the Minnesota Supreme Court's purported "distinction" plainly ignores the language of Minnesota's use tax, which is imposed expressly upon "the *privilege* of using, storing or consuming in Minnesota tangible personal property." (A-74; emphasis added.)[15]

Even without the First Amendment considerations arising from the nature of the activity subjected to this peculiar use tax, the non-rational $100,000 exemption imposes a graduated tax on business activity which denies Star Tribune equal protection of the law in violation of the Fourteenth Amendment.

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[15] Other state courts, without necessarily citing *Stewart Dry Goods*, have applied its principles to invalidate graduated sales and use taxes. *See, e.g., Volusia County Kennel Club v. Haggard*, 73 So.2d 884, 898 (Fla. 1954) ("Inequality becomes so apparent and obvious when the rate of taxation is increased based solely on the amount of business done that further discussion of the question is unnecessary."); *Kroger Co. v. Schneider*, 223 N.E.2d 606, 611 (Ohio 1967); *Blauner's Inc. v. City of Philadelphia*, 198 A. 889, 893 (Pa. 1938).

IV. When It Has Chosen Not to Tax the Sale of Newspapers, Minnesota Cannot Impose a "Compensating" Use Tax Upon Paper and Ink If a Sales Tax Upon Newspapers Would Abridge Freedom of the Press, Nor Can It Impose a Unique Use Tax on Paper and Ink When the Discriminatory Tax Treatment Is Not Necessary to Accomplish a Compelling State Interest.

The Minnesota Supreme Court acknowledged that the challenged statute taxes newspaper publishers in a different manner than other industrial users of paper and ink (A-8), but upheld the statute because publishers paid a use tax while other industrial users' goods were subject to a sales tax. (A-12-13.) Implicit in the Minnesota Supreme Court's approach to the present issues on appeal are two assumptions which were largely unexpressed in the opinion itself, and consequently received little or no analysis or explanation.

First, the court apparently assumed that a tax on the sale of newspapers would be constitutional. *Second,* it apparently assumed that, if the Legislature chose to exempt newspapers from the sales tax as it did here, (i) it could substitute a use tax or any other tax so long as the overall tax burden on newspaper publishers was equivalent, and (ii) the use tax burden in fact is no different than the sales tax burden. Both assumptions are wrong.

A. A Tax Upon the Sale of Newspapers Would Abridge Freedom of the Press.

The Minnesota Supreme Court disclaimed any ruling on the constitutionality of a sales tax on newspapers. (A-13, n.10.) Nevertheless, it found the challenged use tax to be constitutional and distinguished it from the license tax at issue in

Grosjean on the grounds that "sales and use taxes are now commonplace and readily accepted" and have "no 'long history of hostile misuse against the freedom of the press.'" (A-12.) Thus, the Minnesota Supreme Court clearly proceeded from an assumption that a tax upon the sale of newspapers would be constitutional.

If this Court chooses to address this broader issue, Star Tribune submits that a tax imposed directly on the sale of newspapers would violate the First Amendment.[16] The sale of newspapers or other information is an activity protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness*, 49 U.S.L.W. 4762, 4764 (1981); *Smith v. California*, 361 U.S. 147, 150 (1959). By imposing a tax upon the sale of newspapers the State would create a direct financial obstacle to the very act of dissemination of information; if buyers cannot or will not pay the additional amount necessary to satisfy the sales tax, the transfer of information may not occur, or may occur less often.

Although this Court has never given plenary consideration to the constitutionality of a tax on the sale of newspapers, it has invalidated state-created financial obstacles to communication in the form of license taxes. *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (city could not require distributor of religious literature to obtain occupational license); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (city could not require occupational license for Jehovah's witness who distributed

[16] Even the State's counsel concedes that Minnesota's current statutory exemption of newspapers from sales tax is supported, if not compelled, by constitutional principles. (A-34-35.) The exemption is part of a large body of legislation intended to enhance the First Amendment values of uninhibited, robust and wide-open public debate. The courts look with favor upon such legislation. *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976); *cf. Walz v. Tax Commission*, 397 U.S. 664 (1970).

religious literature door-to-door and solicited purchases of books and pamphlets); *Jones v. City of Opelika*, 319 U.S. 103 (1943), *reversing and adopting dissenting opinions*, 316 U.S. 584 (1942) (invalidating annual occupational license to sell religious books). This Court's citations of *Grosjean* in *Follett*, 321 U.S. at 577, and in *Murdock*, 319 U.S. at 114-115, suggest that this Court viewed the early "taxes on knowledge" as direct taxes on the exercise of a First Amendment right. The stamp tax on the circulation of newspapers was the equivalent of a sales tax in all of its essential features. The English Stamp Tax differed from a modern-day tax on the sale of newspapers only in its exorbitant amount and in its failure to be fixed as a percentage of the sales price.[17] The stamp was simply the chosen method of collecting the tax in advance. *See generally* sources cited at p. 18 above.

The Minnesota Supreme Court chose to interpret *Follett*, *Murdock* and *Jones* narrowly, and relied instead on *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, *appeal dismissed*, 358 U.S. 39 (1958). (A-14.) *Steinbeck* involved a "privilege tax" imposed on gross receipts received from trades, professions or commercial activities, including the profession of author. As with the taxes measured by gross business receipts involved in *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947), and *Giragi v. Moore*, 64 P.2d 819 (Ariz.), *appeal dismissed*, 301 U.S. 670 (1937), the *Steinbeck* tax fell upon the accumulation of income by all businesses.[18] In each case, the lower courts

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[17] The same differences existed between the English tax on advertisements and the Louisiana license tax which this Court invalidated in *Grosjean*, but those differences did not receive even passing mention in the *Grosjean* opinion.

[18] Although the dismissal of the appeal in *Steinbeck* has some precedential value, it is not of the same precedential value as would

looked at the impact of the tax upon annual revenues rather than upon individual transfers of information; in each case, the tax itself was based upon gross receipts of the seller, who also paid the tax, rather than upon the individual sale in which the buyer would be required to pay the tax as a condition of the transfer of property.[19]

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be an opinion of this Court treating the question on the merits, particularly where constitutional questions are involved, as they are involved here. *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974). "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari v. Steinberg*, 419 U.S. 379, 392 (1974) (Burger, C.J., concurring). Summary dispositions affirm the judgment but not necessarily the reasoning of the lower court, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979), and extend only to "the precise issues presented and necessarily decided," *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). "[N]o more may be read into [this Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

[19] The Arizona annual privilege tax at issue in *Giragi* was tied to "the gross proceeds of sales or gross income from the business," 58 P.2d at 1249 (prior opinion). The Arizona Supreme Court commented in upholding the tax: "[A]ll who share the protection given by the government should also share the expense of that protection *in proportion to their ability*, regardless of the business they are engaged in, if it is for profit." 64 P.2d at 822 (emphasis added). Likewise, the city taxes in *Tampa Times* and *Steinbeck* were viewed as the functional equivalents of income taxes. *Tampa Times Co. v. City of Tampa*, 29 So.2d at 370 ("Admittedly a tax, in any form or guise, is a burden yet that alone does not impair freedom of the press any more than an income or ad valorem tax will destroy freedom of speech to any other citizen . . . . A state may choose to substitute a gross sales tax but in that case the relative burden on a newspaper would not be changed."); *Steinbeck v. Gerosa*, 151 N.E.2d at 177 (The city gross receipts tax "is, like any tax, a burden. Nevertheless, it does not impair Mr. Steinbeck's right of freedom of the press any more than an income tax impairs such right.").

The Minnesota sales and use tax system does not lend itself to such benign interpretations. It is not an income tax; Minnesota separately taxes net corporate and personal income. Minn. Stat. §§ 290.02, 290.03 (1980). The sales tax is tied to the sales price of the article sold and not to the gross revenues of the seller, and the State *prohibits* the seller from absorbing the amount of tax. Minn. Stat. § 297A.03. Thus, extending Minnesota's sales tax to newspapers would interpose a tax at the very focal point of the constitutionally protected activity: the transfer of information.[20] A Minnesota publisher could then

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[20] The State does tax the sale of books and other printed communications published less than four times per year. (JA-31.) Both the State (Motion at 21 n.9) and the Minnesota Supreme Court (A-13 n.10) seemed taken with the notion that books, which are clearly protected by the First Amendment, are subject to retail sales tax in Minnesota, without any known court challenge to the constitutionality of such a tax.

The sale of books, as well as the sale of newspapers and magazines, is constitutionally protected activity. This Court recognized as much in *Smith v. California*, 361 U.S. 147, 150 (1959) and in *Burstyn v. Wilson*, 343 U.S. 445, 501-02 (1952), each of which cited *Grosjean* for the proposition that a profit motive or "commercial auspices" of the sale will not take the activity outside the scope of the First Amendment. Ironically, books largely escaped the original English taxes on knowledge; the principal objective of the government was the suppression of small, cheap publications which were circulated among the poorer classes, and books were sufficiently expensive to be enjoyed primarily by the wealthier, progovernment classes. 2 May, *supra* at 172; Siebert, *supra* at 311. However, the tax on paper affected, and was opposed by, publishers of books as well as publishers of newspapers. 2 May, *supra* at 215; 2 Collet, *supra* at 86.

The apparent absence of court challenges to taxes on the sale of books probably says more about the distribution of the burden of such taxes than about their constitutionality. Publishers of books as a general rule neither pay nor collect the sales tax. Retailers collect but do not pay the sales tax. Customers do pay the tax on each purchase, and this payment does affect the exercise

no more lawfully sell a newspaper to a reader without collecting the tax than he could lawfully have sold an unstamped newspaper in England at the time the First Amendment was adopted.

The very number and variety of taxes attest to the fact that each tax has a different impact. In *Follett, Murdock, Jones* and *Grosjean*, this Court carefully distinguished between a tax on income derived from constitutionally protected activity and a tax on the protected activity itself. The net income of a publisher or a minister are not inherently different from the net income of a shoe salesman or an automobile manufacturer; the State can and does tax all such income, subject to the same generally applicable rules, and Star Tribune pays such taxes without constitutional objections. (JA-12.) In contrast, sales and use taxes are imposed upon the transfer of goods or services from one person to another (A-72, 73) or upon "the privilege of using, storing or consuming" property (A-74). These are taxes upon specified activity itself: the sale of newspapers, shoes or automobiles.[21]

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of constitutional rights, because the First Amendment protects the right to receive information as well as the right to transmit information. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). However, the taxes on an individual's purchases are not likely to amount to enough to induce him to seek judicial vindication of his rights. This Court has shown its sensitivity to such pragmatic considerations in prior First Amendment cases. *See, e.g., Bantam Books v. Sullivan*, 372 U.S. 58, 64 & n.6 (1963).

[21] If the State may impose a direct tax upon activity, it need not limit the tax to activity with commercial aspects. Indeed, Minnesota for years taxed transfers of property by gift at substantially higher rates than it taxed transfers for consideration. *See* Minn. Stat. § 292 *et seq.* (1978), *repealed* 1979 Minn. Laws, Ch. 303, Art. 3, § 41. Gifts not in excess of $3,000 in value to any one person

To the extent that sales taxes fall directly upon expressive activity, they encroach upon First Amendment freedoms. The State may not justify this direct burden on constitutionally protected expressive activity simply by contending that it imposes an equivalent burden on unprotected mercantile activity. As this Court said in condemning the license tax at issue in *Murdock v. Pennsylvania*, 319 U.S. at 115:

> A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

See also, Jones v. City of Opelika, 316 U.S. at 620 ("The exercise, without commercial motives, of freedom of speech, freedom of press, or freedom of worship are not proper sources of taxation for general revenue purposes.").

The "without commercial motives" *caveat* of the above quotation from *Jones* has no bearing on the present case. The ultimate majority in *Jones* found it "unnecessary to consider now the validity of such taxes [license taxes for revenue purposes] on commercial enterprises engaged in the dissemination of ideas." 316 U.S. at 619. To the extent that *Jones, Murdock* and other past decisions of the Court "hold or indicate that commercial speech is excluded from First Amendment

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by any donor during any calendar year were exempted from tax. Minn. Stat. § 292.04(6) (1978). This exemption prevented the gift tax from creating any substantial problem for expressive activity such as the distribution of handbills, free newspapers and the like. It is worth noting that this exemption, unlike the $100,000-per-publication exemption of the challenged use tax, applied to all gifts, not just gifts of particular items.

protections, those decisions, to that extent, are no longer good law." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 n.7 (1980). The fact that Star Tribune sells its newspapers to earn a profit, among other reasons, does not justify interference with its First Amendment rights. "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952). The "commercial motives" connected with some expressive activity are suitably and adequately taxed by personal and corporate income taxes, which are levied upon the profit derived from the activity and not upon the activity itself. *See* Note, *Use of Taxation and Licensing in the Suppression of Freedom of Religion and the Press*, 52 Yale L.J. 168, 172-73 (1942).

If the First Amendment prohibits a State from enacting legislation which imposes a tax on the sale of newspapers, it follows that a State cannot reach the same result indirectly through the simple expedient of first enacting and then deleting a statutory exemption from the sales tax. The ability to strip the press of an existing statutory immunity from taxation, at any time and for any reason, raises the same specter of censorial abuse as does the ability to levy a special tax upon newspapers. *Speiser v. Randall*, 357 U.S. 513 (1958). Nor can Minnesota circumvent the constitutional invalidity of a sales tax on newspapers by imposing a special "compensating" use tax to which no other similarly situated taxpayer is subject. *See Phillips Chemical Co. v. Dumas Ind. School Dist.*, 361 U.S. 376, 382-83 (1960); *Miller v. City of Milwaukee*, 272 U.S. 713 (1927).

B. Even If a Tax Upon the Sale of Newspapers Would Be Constitutional, Minnesota's "Compensating" Use Tax Upon Paper and Ink Must Be Invalidated Because Its Discriminatory Classifications Are Not Necessary to Accomplish a Compelling State Interest.

Minnesota specifically exempts publications from its sales tax, but it imposes a use tax on paper and ink, and further carves out a $100,000-per-publication exemption from the use tax; as a result, it discriminates between publishers and other industrial users of paper and ink, between foreign and domestic publishers, between large and small publishers, and between newspapers and other entities which are exempted from the sales tax. The burden of the challenged use tax is not equivalent to that of the general sales tax. Rather, it is a special tax abridging freedom of the press. Contrary to the suggestion of the Minnesota Supreme Court, the challenged use tax does not fit neatly into "a general system of sales and use taxation to which most goods (other than food, clothing and medicine) are subject in Minnesota." (A-12.) It has unique features which distinguish and separate it from the general system of Minnesota sales and use taxes, with resulting discrimination against large Minnesota newspaper publishers. That discrimination is not necessary to serve any compelling state purpose.[22]

First, no other general or special provision of Minnesota's sales and use tax laws provides a significant exemption based

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[22] On the present record, any attempt to identify the State's purposes for the discriminatory classifications of the challenged use tax necessarily involves speculation. There is no official legislative history, apart from the changes in the statutory language itself, to document the legislative purpose of the challenged use tax. In Appellant's Informal Brief before the Minnesota Supreme Court at page 17, the State concedes: "The lack of any extant legislative history regarding the $100,000 exclusion makes it impossible to know precisely what purposes the legislature had in mind when

upon the dollar amount of purchase.[23] The $100,000 exemption thus creates a distinction not only within the class consisting of all newspapers, but also between newspaper publishers and all other taxpayers.

The State suggests that because the $100,000 exemption applies to all publications, it is nondiscriminatory, "because the

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it adopted the provision in 1973." The same vacuum exists with respect to the 1971 legislation.

The absence of legislative history is the State's own responsibility. The Minnesota Legislature is well aware of how to make clear the objectives of its legislation, particularly when it anticipates litigation. *See Contos v. Herbst*, 278 N.W.2d 732, 734-35, 738 (Minn.), *appeal dismissed* 444 U.S. 804 (1979). It is also well aware of how to obscure its objectives. For example, both the Minnesota Senate and House of Representatives, by rule, provide for the recording of certain legislative proceedings and the preservation of the tape recordings in the Minnesota State Legislative Reference Library; however, those same rules expressly provide that the discussions on the tapes are not to be admissible in any court or administrative proceeding on the issue of legislative intent. *See* Rule 1.18 of the Rules of the Minnesota House of Representatives (". . . Discussion preserved under this rule is not intended to be admissible in any court or administrative proceeding on an issue of legislative intent."); Rule 65 of the Permanent Rules of the Senate (". . . It is the intention that testimony and discussion preserved under this rule not be admissible in any court or administrative proceeding on an issue of legislative intent.").

When legislation is subject to strict and exacting scrutiny, as is the challenged use tax here (see pp. 14-17 above), proffered explanations of legislative purpose based on speculation and unsupported by evidence in the legislative record will not suffice. This Court does not accept mere recitations of benign purposes for legislation which impairs fundamental rights or involves suspect classifications, when those explanations are supplied only by hindsight or as an afterthought. *See, e.g., Mississippi University for Women v. Hogan*, 50 U.S.L.W. 5068, 5071 (1982); *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 447-55 (1972).

[23] The only other provisions of Minnesota's sales and use tax laws, Minn. Stat. Ch. 297A, providing any exemption whatsoever based upon the amount of purchase are those disregarding sales where the tax would be less than one half of one cent. *See* Minn. Stat. §§ 297A.03 subd. 2 (A-73-74), 297A.18.

Fourteenth Amendment guarantees only equal laws, not necessarily equal results." (Motion at 23.) For the State's suggestion to be accurate, however (even if fundamental constitutional rights were not at issue, as they are here), the $100,000 exemption would have to be at least rational. "*When the basic classification is rationally based,* uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added). The problem with the State's position is that the $100,000 exemption is not even rational, much less necessary to achieve a legitimate compelling state interest.

The bracket system for calculating sales and use taxes[24] approved in *Mouledoux v. Maestri*, 2 So.2d 11 (La. 1941) (cited as principal authority by the State in its Motion at 23) easily met the requirement of rationality:

> [C]omplete equality could be secured only by the coinage of tax tokens or the issue of stamps in denominations of one-fifth mill. Every purchase involving an odd number of cents would require a unit that small to compute the tax accurately at 2 per cent. Such a solution, it seems to us, would be both oppressive and unnecessary.

Id. at 21. Similar justifications based upon administrative convenience support the general "rounding" provision of Minn. Stat. § 297A.03 subd. 2 (A-73-74) as well as the fee categories in *Tampa Times Co. v. City of Tampa*, 29 So.2d 368, *appeal*

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[24] The bracket system provided that on transactions from 1 cent to 12 cents inclusive, there was no tax, on transactions from 13 cents to 62 cents inclusive, the tax was 1 cent, on transactions from 63 cents to 99 cents inclusive, the tax was 2 cents, and on each transaction of $1 even, the tax was 2 cents plus the foregoing rates on the amount in excess of the even dollar. *Mouledoux v. Maestri*, 2 So.2d 11, 21 (La. 1941).

dismissed, 332 U.S. 749 (1974): not only are the categories uniform, but the variations in tax amounts involved are *de minimis*.

No such rationale explains the present $100,000 exemption. At a 4 percent tax rate, the $100,000 exemption confers a $4,000 tax benefit on each publication. The State actually collected less than this amount in paper and ink use taxes from five of the 11 taxpaying publishers in 1974 and from seven of the 13 taxpaying publishers in 1975, collecting as little as $120 in 1974 from the *Fergus Falls Daily Journal*. (A-5-7, nn. 4 & 5.) This is far from *de minimis* impact. The $100,000 exemption category is so arbitrary and non-rational that it would violate the equal protection provisions of the Fourteenth Amendment even if it did not also impair First Amendment rights. See pp. 31-33 above. Furthermore, mere administrative convenience (if even that exists here) is not a compelling state interest which will justify a classification which affects fundamental constitutional rights, including freedom of the press. *Carey v. Population Services International*, 431 U.S. 678, 691 (1977); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Because of its size, the $100,000 exemption works contrary to the purported revenue-raising objective of the tax. The total taxes *collected* under this use tax on paper and ink during the years at issue were only about one-half of the potential revenue tax *loss* caused by the $100,000 exemption.[25] Even limiting consideration of the effect of the $100,000 exemption to those newspapers which actually paid some tax, the revenue

[25] At a use tax rate of 4 percent and an exemption of $100,000 per publication, the revenue loss is $4,000 per publication. With approximately 400 Minnesota newspapers, the potential annual revenue loss is 400 times $4,000, or $1.6 million. Because not all newspapers consume $100,000 of paper and ink products, the actual revenue loss each year is somewhat less. Total revenues collected were $893,355 in 1974 and $944,055 in 1975. (A-5-6, nn. 4 and 5.)

loss from the exemption in 1974 and in 1975 nearly equalled the total taxes paid by all newspapers except the daily newspapers in Minneapolis and St. Paul.[26] If the $100,000 exemption were extended to all taxable items, the State would have lost 40 to 44 percent of all the sales and use tax revenues which it collected in the 1973-1975 period. (*See* Star Tribune's Memorandum in Support of Motion for Summary Judgment, Appendices B, C, D, and F.)

Second, the challenged use tax on paper and ink distorts the function of a compensating use tax. All States that impose sales taxes also impose a corollary, compensating use tax on property purchased outside the State; the tax is intended to protect both local merchants and the local treasury by taxing the intrastate use of property which would have been subject to the sales tax had it been purchased within the State. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977); Note, *Economic Neutrality and the Compensating Use Tax*, 16 Stan. L.Rev. 1016, 1016 (1964).

In contrast, the challenged use tax on paper and ink is not a compensating tax because it does not reach out-of-state transactions at all. Only Minnesota newspaper publishers pay the use tax, notwithstanding the fact that all newspapers sold in Minnesota are exempt from the sales tax, regardless of where they are published. (A-87.) If Minnesota attempted to

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[26] In 1974, Minnesota collected $82,473 from all newspapers except the daily newspapers in Minneapolis and St. Paul. (A-5, n.4.) That year, 14 newspapers (published by 11 publishers) reached the $100,000 threshold and paid some tax. At $4,000 per newspaper, the $100,000 exemption cost Minnesota $56,000 in lost revenues that year from the taxpaying publishers alone. Similarly, in 1975, Minnesota collected $90,302 from all newspapers except the daily newspapers in Minneapolis and St. Paul, (A-6, n.5) while revenues lost from the 16 newspapers exempted that year were $64,000. These figures do not include the potential revenues actually lost from other newspapers which failed to reach the $100,000 threshold and consequently paid no tax whatsoever.

impose greater taxes on foreign than domestic businesses, it would violate Commerce Clause principles articulated by this Court since at least *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Similarly, Minnesota's decision to single out domestic newspaper publishers for a discriminatory use tax violates the First Amendment's guarantee of a free press. *Cf. Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 & n.3 (1973) (peril to specific federal right, whether based on First Amendment or interstate commerce, restricts leeway ordinarily granted to States in making classifications for tax systems). The fact that Minnesota's domestic newspaper publishers (which are subject to the challenged use tax) are more likely to criticize the State government on a regular basis than are foreign newspaper publishers (which are exempt from Minnesota's sales and use taxes) suggests one motive for the State's discriminatory tax treatment.

Third, Minnesota purports to have adopted a unified scheme of sales and use taxation which taxes only final products, and not component parts. *See Standard Packaging Corp. v. Commissioner of Revenue*, 288 N.W.2d 234, 239 (Minn. 1979). In contrast, the challenged use tax on paper and ink is not imposed when the final product (newspapers) is purchased at retail by the ultimate user (a reader), but instead is imposed upon the consumption of a newspaper's essential component parts (paper and ink) during the publication process. A sales tax is imposed only when and if a sale actually occurs, but the newspaper publisher (once over the $100,000 annual threshold) pays the use tax on paper and ink consumed in publishing every copy of each issue, without regard to the sales price or to whether a copy is spoiled in printing, cannot be sold or is given away. Approximately 86 to 92 percent of the newsprint consumed by Star Tribune becomes newspapers actually distributed to readers. The remaining 8 to 14 percent rep-

resents waste. (JA-12.) Thus, the challenged use tax is broader than a sales tax, because it taxes items which are not ultimately sold at retail.

The newspaper publisher pays the use tax directly to the State, whereas the publisher would act merely as a collection agent of a sales tax. The Minnesota Supreme Court rejected Star Tribune's argument based upon this factor as being "without merit," because "producers of goods are free to assume the burden of any tax or pass some part of it on to consumers in the form of higher retail prices." (A-14.) That assumption ignores the practicalities of newspaper pricing: single-issue prices of newspapers invariably increase by multiples of five cents, but the use tax burden on a single issue could be one or two pennies. This makes it extremely cumbersome for a publisher to "pass on" the use tax burden.

To the extent that a newspaper's final price does include the use tax burden, the tax is nearly invisible to the consumer because it is not calculated separately at the time of sale (as is a sales tax), and therefore is less likely to provoke public sentiment for repeal of the tax. (*Cf.* A-34-35.)

In several important ways, therefore, the burden which the challenged use tax imposes upon publishers of large Minnesota newspapers is significantly greater than that which would be imposed by the hypothetical tax on the sale of newspapers.

Fourth, imposing the challenged use tax upon component parts rather than upon a finished product produces other discriminatory treatment between newspaper publishers and other industrial users. The "industrial use" exemption applies to all materials used or consumed in agricultural or industrial production of personal property "intended to be sold ultimately at retail," but does not require that the ultimate sale at retail itself be subject to tax. The industrial user of paper and ink pays no tax on his consumption of those raw materials, regardless of whether his final product is a taxable roll of

wrapping paper, a tax-exempt milk carton (A-84, Minn. Stat. § 297A.25 subd. 1 (a)), or a tax-exempt school textbook (A-90, Minn. Stat. § 297A.25 subd. 1(v)). Of all instances in which the sale of a final product is tax-exempt, only newspaper publishers are subjected to a "compensating" use tax on consumption of materials used to make that final product.

The Minnesota Supreme Court did not determine whether any of this discriminatory treatment of large Minnesota newspaper publishers is necessary to the State's generalized need to raise revenue. Its sole suggested reason for subjecting newspapers to a use tax rather than a sales tax was "the difficulties and expense of collecting sales tax upon sales of such low-priced items." (A-13.) That rationale is contradicted by the State's practice. The State taxes the sales of many low-priced items as diverse as pipe cleaners, picture hangers, toothpicks, paper clips and six-inch plastic rulers and it presently exempts only sales at prices of nine cents or less. Minn. Stat. § 297A.03 subd. 2 (1981).

A State constitutionally may not tax newspaper publishers on a different basis, and at a different rate, than it taxes other persons, simply by placing the publishers' tax within a broad taxing statute and then proffering the general need to raise revenue as the shield to judicial scrutiny. As discussed above, Minnesota's sales and use taxes discriminate between publishers of large and small newspapers, between domestic and foreign publishers, between publishers and other industrial users of paper and ink (and other raw materials), and between publishers and other entities (and between newspapers and other products) which enjoy a statutory exemption from the sales tax—all to the disadvantage of publishers of large Minnesota newspapers. None of this discriminatory tax treatment has been shown, or could be shown, to be necessary to accomplish any compelling state interest.

CONCLUSION

This is not a case in which the press requests new and special privileges. Instead, Star Tribune simply seeks the protections which the Framers of the Bill of Rights fought to incorporate within the First Amendment, and which this Court unanimously reaffirmed in *Grosjean v. American Press Co.*

The decision of the Minnesota Supreme Court undermines fundamental constitutional principles. The challenged use tax directly burdens expressive activity and blatantly discriminates against and among newspaper publishers. The First and Fourteenth Amendments do not countenance such a tax.

The January 5, 1982, judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
SEP 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1839

IN THE

Supreme Court of the United States

October Term, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

BRIEF OF APPELLEE MINNESOTA COMMISSIONER OF REVENUE

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QUESTIONS PRESENTED

1. Whether the provision in Minnesota's general sales and use tax law imposing a use tax on paper and ink is constitutional under the freedom of press guarantees of the first and fourteenth amendments, when both the language and history of the tax show it to be nothing more than a reasonable measure for the sole purpose of raising needed revenues, and when imposition of the tax is neither content-related nor restrictive of free expression.

2. Whether Minnesota's use tax on paper and ink purchased for use in the production of all "publications" not taxed when sold as final products (with an across-the-board exclusion for each publication of the first $100,000 of such purchases annually) is constitutional under the equal protection guarantee of the fourteenth amendment.

NOTE AS TO ABBREVIATIONS

Throughout this Brief, Appellee will use the following abbreviations:

"A. —" refers to pages in the Appendix to Jurisdictional Statement.

"JA. —" refers to pages in the Joint Appendix.

"Brief at —" refers to pages in the Brief of Appellant.

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BRIEF OF APPELLEE MINNESOTA COMMISSIONER OF REVENUE

STATUTES INVOLVED

Relevant provisions of the Minnesota statutes involved are set forth in the appendix to Jurisdictional Statement. (A. 70-90).

In addition Minnesota has issued a regulation interpreting the statutory language which is found in 13 Minn. Code of Agency Rules [hereinafter abbreviated as "MCAR"], Tax S&U 409. This regulation is reproduced in Joint Appendix P. (JA. 30).

STATEMENT OF THE CASE

This is a direct appeal by the Minneapolis Star and Tribune Co. [hereinafter "Star Tribune"] from the decision of the Minnesota Supreme Court upholding the constitutionality of the third paragraph of Minn. Stat. § 297A.14. The law is an integral part of Minnesota's general sales and use tax law and it imposes a use tax on the purchase of paper and ink used in the production of "publications" which are not subject to sales or use tax when sold as final products. The first $100,000 in annual purchases of paper and ink by each publication is excluded from the measure of the tax.

The facts pertaining to the history and setting of this use tax are important to the case and are essentially undisputed. When the Minnesota legislature first enacted the general sales and use tax in 1967, a tax was laid upon the sale or use of virtually all tangible personal property in the state of Minnesota. Minn. Stat. §§ 297A.02 and 297A.14 (1967). Notable exemptions were for food, medicine and clothing. Minn. Stat. § 297A.25, subd. 1, paras. (a), (b) and (g) (1967). In addition, sales of certain (but not all) publications, as well as the paper and ink which went into producing them, were statutorily exempted from the general sales and use tax. Minn. Stat. (1967) § 297A.25, subd. 1(i).

The category of exempt "publications" was statutorily defined to include, besides newspapers, such printed matter as magazines, advertising supplements, shoppers guides, house organs, trade and professional journals and serially issued comic books.[1] *See* 13 MCAR, Tax S&U 409B. (JA. 31). In

[1] The term "publication" is statutorily defined by Minn. Stat. § 297A.25, subd. 1(i), as any type of publication "regularly issued at average intervals not exceeding three months" including "a legal newspaper as defined by Minn. Stat. 1965, Section 331.02".

addition, monthly advertising circulars printed and distributed by wholesale and retail merchants have been construed to be tax exempt publications. *United Hardware Distributing Company v. Commissioner of Revenue,* 284 N.W.2d 820 (Minn. 1979).

Not included in the exemption for publications were such printed materials as books, political campaign newsletters and law briefs, all of which were subject to sales tax when sold as final products at retail. 13 MCAR Tax S&U 409B. (JA. 31).

The statutory class of exempt "publications" remained completely free from the sales and use tax until 1971. In that year the Minnesota legislature enacted a comprehensive tax reform measure which essentially shifted the burden of financing schools and other local government services from the local property tax to the state-wide sales and use tax, and the income tax. *See* Minn. Laws 1971, Ex. Sess., c. 31, parts of which are reproduced in the Appendix to the Jurisdictional Statement. (A. 70-82). One part of this reform measure amended Minn. Stat. § 297A.25, subd. 1(i), to remove the exemption which had previously been granted on purchases of paper and ink used in printing tax exempt publications. (A. 77-78). Thereafter, all producers of tax exempt publications in Minnesota had to pay a sales or use tax on the paper and ink which they purchased.

This tax remained in effect, unchallenged by any court proceeding, until the 1973 Minnesota legislature again amended the law effective January 1, 1974. Minn. Laws 1973, c. 650, art. XIII, §§ 1-2. (A. 84, 87). That amendment provided that in calculating the tax an across-the-board exclusion benefit of the first $100,000 in annual purchases would be given to each publication. In 1974, out of 388 paid circulation news-

papers in Minnesota (29 of which were daily papers), 11 publishers of daily newspapers paid the 4% use tax on their purchases of paper and ink above $100,000. (JA. 24-26). In 1975, out of 374 paid circulation newspapers in Minnesota (29 of which were daily papers), 13 publishers of daily newspapers paid the 4% use tax on their purchases of paper and ink above $100,000. (JA. 24-26). The record does not reflect the actual impact of the tax on other "publications" besides newspapers, such as advertising supplements, trade journals and serialized comic books.

Appellant Star Tribune is a company engaged in the business of printing newspapers, which are included in the class of exempt "publications" not subject to Minnesota's sales and use tax when sold as final products. (JA. 3 and 7). Under the statute in question, Star Tribune paid a use tax of $608,634 to Minnesota on its purchases of paper and ink in excess of $200,000 during 1974, and a tax of $265,631 for the period from January 1, 1975 through May 31, 1975. (A. 4, n. 3; A. 5, n. 4 and A. 6, n. 5).

No evidence whatsoever has been presented to show that, in enacting the use tax herein, Minnesota's legislature had any motive other than that of raising revenue; or had any sort of malicious or improper intent toward Minnesota's large-circulation newspapers, such as controlling their content or restricting their publication. Nor is there any evidence to show that the tax has had the effect of controlling content or restricting publication.

Star Tribune commenced this action in August, 1975, seeking a refund of the taxes it had paid. (JA. 3-6). On January 25, 1980, Star Tribune filed a motion for summary judgment. (JA. 8). On May 30, 1980, the state district court granted

summary judgment in favor of the Star Tribune declaring the use tax in question unconstitutional. (A. 49-66).

The Minnesota Commissioner of Revenue [hereinafter "Commissioner"] appealed that ruling to the Minnesota Supreme Court, which reversed the district court's decision on December 17, 1981. (A. 1-19). Star Tribune took a further appeal to this Court and probable jurisdiction was noted on June 21, 1982.

SUMMARY OF ARGUMENT

A. This is a clear case of a state tax law drafted to achieve the valid purpose of raising needed revenues, without impinging an iota upon the first amendment's basic interest in the free flow of information and ideas. Both the language of the statute and the facts of the case show that the tax is non-content related, non-regulative of the press, and non-restrictive of anyone's ability to print what he chooses. The history and setting of the basic use tax, first enacted in 1971 as part of a comprehensive tax reform act intended to improve the system of public education in Minnesota, and without the across-the-board $100,000 exclusion, reveal that its fundamental purpose was valid and that it was not intended as an attack on large newspapers. The tax is neither a license tax nor directly tied to circulation. Rather it was designed solely to raise revenue, and is thus one of "the ordinary forms of taxation" which can be imposed upon newspapers without infringing the first and fourteenth amendments. *Grossjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Unlike the situation in *Grossjean*, there is no evidence that Minnesota's tax resulted, or was intended to result, in a restriction on the free flow of ideas.

B. Since the tax in question is non-content related, proper resolution of the first amendment issue is through a balancing of the competing interests. *See Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961). Those interests are Minnesota's need for revenue, fundamental to its government, and the first amendment's interest in the free flow of ideas. In performing this balance it is apparent that the tax does not actually suppress or regulate speech at all, but continues to allow complete freedom of communication by the press. Therefore, the basic interests protected by the first amendment are essentially unaffected and the balance must be resolved in favor of upholding the tax as a valid exercise of Minnesota's taxing power.

C. The Appellant's arguments under the equal protection clause are equally unavailing. The use tax is valid whether judged by the strict scrutiny standard or the more appropriate "any rational basis" test, which is the correct standard for review because this tax simply does not interfere with Star Tribune's exercise of first amendment rights, much less impermissibly so. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 311, 312 (1976). The commercial purchase of paper and ink is not a fundamental right, the protection of which demands application of strict scrutiny to an otherwise general sales and use tax law. As in *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946), which upheld a statutory classification between large and small newspapers without applying strict scrutiny, this case should be governed by the "any rational basis" test.

D. Whichever standard of review is applied, the classifications resulting from Minnesota's use tax are clearly valid.

Looking first to the basic tax, without the $100,000 exclusion benefit, it is apparent that the differences in Minnesota's general sales and use tax law between "publications", whose products are exempt from sales tax when sold at retail, and other industrial users of paper and ink, whose final products are subject to sales tax, are significant and justify a distinction. The cost of paper and ink used by non-publications is already taxed when the final product is sold at retail; their cost should therefore not be taxed again before that time. Exempt "publications" have no such problem, and in fact their burden is less under the use tax because it is figured on the wholesale price level. Star Tribune's complaint that producers of other exempt articles (like milk cartons and school textbooks) are not also subject to the use tax has no more merit than the suggestion that seamen and farm workers had to be included along with newspaper employees under the Fair Labor Standards Act. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 193 (1946). The Constitution does not require that all valid exemptions from a general law, each based upon distinct grounds, be revoked simply because a legislature has chosen to modify one of them for an otherwise valid purpose. Star Tribune's further contention that once Minnesota grants a sales tax exemption to newspapers it cannot, thereafter, impose any lesser tax fails as a matter of both logic and law. What the state has the power to grant it certainly has the power to take away, or modify. Likewise, Star Tribune's argument that the tax unconstitutionally discriminates in favor of foreign publications fails because Minnesota has no power to impose this use tax on foreign publications anyway. *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157, 162 (1940).

E. Finally, the $100,000 exclusion benefit does not create an impermissible classification. First, it applies equally to all publications. *Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Second, since the $100,000 exclusion is not content related, it is not subject to the strict scrutiny applied to laws which are. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). The exclusion strikes a proper balance between the state's interest in collecting revenue under an equitable system and the first amendment's interest in a free flow of ideas. It provides relief to small publications who normally have less ability to pay, while at the same time decreasing the burden on larger publications. It is therefore a benefit given equally to all publications, not a penalty aimed at large newspapers. In any event, reasonable distinctions between large and small business, including publications, have long been upheld, and a primary purpose of the first amendment itself is to protect the small and impecunious publisher.

ARGUMENT

I. SINCE THE LANGUAGE AND HISTORY OF MINNESOTA'S USE TAX ON PAPER AND INK SHOW THAT IT IS SOLELY A GENERAL LAW, RATIONALLY RELATED TO THE SIGNIFICANT GOVERNMENT PURPOSE OF RAISING NEEDED REVENUES, AND THAT IT IS NEITHER CONTENT RELATED NOR RESTRICTIVE OF FREE EXPRESSION, THE TAX IS CONSTITUTIONAL UNDER THE FREEDOM OF PRESS GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. Description Of The Tax And Its History.

At the outset it is important to recognize exactly what Minnesota's use tax on paper and ink does and does not do, as well as to understand the history and setting of the law. Ultimately, the tax simply raises needed state-wide revenues from a class of previously untaxed commercial purchase transactions, without discrimination as to the content of the publications taxed, and without any regulation of, or restrictions on, the first amendment's basic interest in the free flow of ideas and information.

Minn. Stat. § 297A.14 (1974), reads in relevant part as follows:

> For the privilege of using, storing or consuming in Minnesota tangible personal property, . . . purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail . . ., unless the tax imposed by section 297A.02 was paid on said sales price.
>
> . . . .

> Notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section.

On its face, this statute does nothing more than extend Minnesota's general use tax to purchases of paper and ink by those who print a statutorily defined class of "publications".[2] This class of publications includes not just newspapers, but also, *inter alia*, magazines, advertising supplements, shoppers guides, house organs, trade and professional journals and serially issued comic books. 13 MCAR, Tax S&U 409(b). (JA. 31). Thus, the tax is aimed at a broad class of businesses.

Of course, not all industrial users of paper and ink, e.g. printers of books and legal briefs, are subject to the use tax on paper and ink. However, as will be explained in the discussion of the equal protection issue, Argument IIB, *infra*, those items are subject to sales tax when sold at retail.

The use tax on paper and ink is imposed at the same 4% rate applicable under Minnesota's general sales and use tax, and therefore cannot be raised without also raising the tax rate on all other businesses and persons subject to Minnesota's sales and use tax law.[3] The law provides an exclusion from

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[2] "Publications" are exempt from sales tax under Minn. Stat. § 297A.25, subd. 1(i) (1974), which is reproduced in the Appendix to Jurisdictional Statement. (A. 87).

[3] The general rate of tax on all businesses has now been raised to 5% for the two year period of July 1, 1981 to June 30, 1983. Minn. Laws 1981, First Sp. Sess., c. 1, art. IV, § 5.

taxation for the first $100,000 of paper and ink purchased. The exclusion is equally available to all publications, including Star Tribune which, in fact, received two exclusions—one for its morning and one for its evening editions—amounting to $200,000. (A. 4, n. 3; and A. 91).

This then is what the tax does. Equally important to a first amendment factual analysis is what the tax does *not* involve. First, its imposition is *not* content related in any way. On its face and as applied, Minn. Stat. § 297A.14 simply does not distinguish between any publication or other printed matter upon the basis of the subject matter contained therein. *Compare Heffron v. Intn'l. Society for Krishna Consciousness*, 452 U.S. 640, 648 (1981), *with Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 536 (1980).

Second, the tax does *not* prohibit anyone from going into the business of printing a publication. The tax is not a license tax upon the privilege of printing or engaging in the business of printing a publication, thus distinguishing it on its face from the license taxes held invalid in *Grossjean v. American Press Co.*, 297 U.S. 444 (1936); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

Third, the tax does *not* vest discretion in any government official with regard to the laying or collecting of the tax. *Compare Cox v. New Hampshire*, 312 U.S. 569 (1941), *with Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Fourth, the tax does *not* represent any sort of regulation, attempted or actual, of the publication business. Under the law in question Minnesota does not even purport to have a say in how Star Tribune runs its business or what Star Tribune should print in the course of that business. *Cf., Miami*

Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974). Thus, Minnesota's law represents even less of an intrusion into the workings of the press than did the National Labor Relations Act upheld in *Associated Press v. NLRB*, 301 U.S. 103 (1937); the Fair Labor Standards Act upheld in *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946) and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); and the injunction against a newspaper's monopolistic advertising practices upheld in *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-156 (1951).

Finally, as the Minnesota Supreme Court noted in its opinion below, the law in question is *not* ". . . a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers distributed by publishers such as Star Tribune." 314 N.W.2d at 207. (A. 12). The Minnesota Supreme Court based this conclusion on its review of the history and setting of the use tax, the essential facts of which are undisputed in this case. As stated by the Court below, that history began with the enactment of Minnesota's general sales and use tax law in 1967:

> The use tax challenged here is part of a system of sales and use taxes initially created by the state legislature in the Tax Reform and Relief Act of 1967. Act of June 1, 1967, ch. 32, art. 13, 1967 Minn. Laws Sp. Sess. 2143, 2177. The law then wholly exempted from use tax the gross receipts from the sale, storage, use or consumption of all tangible personal property, including paper and ink products, used in or consumed in any publication regularly issued at average intervals not exceeding three months. *Id.* § 25, subd. 1(i), at 2186. The publications themselves were also exempt from sales tax. *Id.* The

rate of sales and use tax was 3% at that time. *Id.* § 2, at 2179; § 14, at 2182.

314 Minn. at 203. (A. 3).

In 1971, however, a new need arose for additional state-wide revenues. In that year the Minnesota legislature had before it a comprehensive proposal for reforming the overall state and local tax burden. Simply stated, the plan called ". . . for the state to take over a large share of the school-financing burden from local districts, mandating a huge increase in the state budget." *See Minnesota: A State That Works*, TIME, August 13, 1973, pp. 24-35, at 35. This was a major social experiment for the state and the debate over it could not be concluded during the legislature's regular 1971 session.

Instead, the legislature was called into extra session, the result of which was the passage of Minn. Laws 1971, Ex. Sess., c. 31. (A. 70-82, partially reproduced only). A reading of that law reveals on its face that among the objects it sought to achieve were the large scale reduction of local property tax burdens, a corresponding increase in state aids to local governments and school districts to make up the difference, and a large scale increase in state-wide tax revenues to finance the program.

To help raise the revenue needed to fund this new program the legislature, *inter alia*, raised the overall sales and use tax rate from three to four percent, Minn. Laws 1971, Ex. Sess., c. 31, art. I, § 2 (A. 73-74), and repealed some previous sales tax exemptions. One of these repealers did nothing more than eliminate the previous exemption for paper and ink products used or consumed in the production of otherwise exempt publications. Minn. Laws 1971, Ex. Sess., c. 31, art. I, § 5. (A. 77).

Thus, as part of a large state-wide tax reform measure, the 1971 legislature simply imposed a use tax upon a class of previously untaxed property transactions for the valid purpose of funding a major new program of property tax reduction and local educational aid.[4]

This basic tax on paper and ink used in exempt publications remained in effect, unchallenged by any court action, until Minnesota again amended the law effective January 1, 1974. Minn. Laws 1973, c. 650, art. XIII, §§ 1-2. (A. 82-90, partially reproduced only). That statute did not repeal the use tax on paper and ink. Instead, the tax remained in effect with the proviso that the first $100,000 in purchases of paper and ink by any exempt publication was to be excluded from the measure of taxation. It is this provision, as amended, which was attacked by Star Tribune when it commenced the present lawsuit on August 26, 1975. (JA. 2-6).

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[4] The importance and success of this tax reform program was widely heralded, and it became popularly known as "The Minnesota Miracle" in providing equal educational opportunity to all Minnesotans. As described in *Minnesota: A State That Works*, TIME, August 13, 1973 at p. 35:

> With such state revenues [Minnesota] increased state aid for education from 43% to 63% in the first year, and now to 70%, thereby decreasing the real estate tax burden by an average of 11.5%.
>
> It was a major piece of social legislation, for within a six-year period, it will virtually equalize the per-pupil spending for education throughout the state and thus go a long way toward equalizing education in the cities, suburbs and rural areas.

B. Minnesota's Use Tax Does Not Have Any Of The Invalid Characteristics Of The Louisiana License Tax Found Unconstitutional In *Grossjean v. American Press Co.*

Throughout this case, chief discussion of the first amendment issue has revolved around the applicability of this Court's decision in *Grossjean v. American Press Co.*, 297 U.S. 233 (1936). Our analysis, therefore, starts with that case. In the beginning, let it be said that there is nothing in *Grossjean* with which the Appellee disagrees. It is clear that that case states sound principles of first amendment law. But it is equally clear that Minnesota's use tax on paper and ink contains none of the characteristics which *Grossjean* found unconstitutional in Louisiana's license tax.

Unlike Minnesota's use tax the tax at issue in *Grossjean* was directly tied to circulation; the statute on its face expressly applying only to publications having circulations in excess of 20,000 copies per week. 297 U.S. at 240. Thus, the Louisiana tax was bad because, in the words of this Court, "its *direct* tendency is to restrict circulation". (Emphasis added.) 297 U.S. at 244-245. In the case at hand, there is no such direct connection between Minnesota's use tax and size of circulation. The statute itself makes no reference to circulation at all, and while the amount of tax will go up with the volume of paper and ink purchased, this link to circulation is tangential at best.[5] It certainly is no more directly connected

[5] In its opinion below, the Minnesota Supreme Court correctly pointed out that on this record there was only a rough correlation between amounts of use tax paid and circulation. 314 N.W.2d at 204-205 (A.7); and that the $100,000 exclusion figure ". . . is only indirectly related to circulation, if at all. Consumption of

to circulation than, for example, the property tax, which can also be expected to increase when large circulation publications have to utilize buildings of greater size and value to accommodate their business. Or the gasoline and tire excise taxes, which increase when greater circulation requires larger fleets of delivery trucks.

Moreover, the *Grossjean* Court intended its comments about restrictions on circulation to be read literally and in context with the plainly abusive purpose of the Louisiana tax. This Court said:

> It [Louisiana's tax] is *not measured or limited by the volume of advertisements.* It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the *plain purpose* of penalizing the publishers and curtailing the circulation of a selected group of newspapers.

297 U.S. at 251. (Emphasis added.)

This language indicates that taxes measured by some criteria other than circulation (as, for example, volume of sales or purchases) would have far less of an impact on the first amendment's basic purpose of preserving a widespread flow of information and ideas. Of course, Minnesota's use tax is measured solely by volume of paper and ink purchased, which

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paper and ink is tied to size and number of pages as well as quantity of copies". 314 N.W.2d at 208. (A. 15-16).

It should also be noted that the $100,000 exclusion does not represent a steeply graduated tax rate tied to circulation. Whereas in *Grossjean* the printing of even one newspaper over the 20,000 limit resulted in the full tax being imposed on all gross receipts, the Minnesota tax comes into effect only on actual purchases exceeding $100,000 (i.e. $1 over $100,000 results in only a 4 cent tax; $2 over $100,000 results in only an 8 cent tax, etc.). Circulation is not a criterion.

is purely a business act sufficiently removed from the actual dissemination of news and opinion.

Another clear difference between the present case and *Grossjean*, is that the Louisiana tax was on its face a license tax imposed only on publications for the privilege of engaging in the business of selling advertising. Minnesota's use tax on the other hand is not, and does not purport to be, a license tax of any kind. It neither prohibits nor regulates the conduct of any publication's business. Therefore, it is not a direct tax upon the exercise of a first amendment right. *Compare Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

Finally, an equally important difference between the present case and *Grossjean*, lies in the fact that the history and setting of Minnesota's use tax show it to be purely a revenue raising measure, with absolutely no purpose of penalizing the press, or restricting the free flow of information. This is a far cry from the Louisiana license tax, which the facts of *Grossjean* showed to be nothing more than a vehicle used by that state's political machine for the deliberate purpose of muzzling a select group of opposition newspapers.[6]

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[6] One of the facts before this Court in *Grossjean* concerning the legislative history of Louisiana's license tax was a circular placed on the desks of members of the legislature after introduction of the measure but before its final passage. It bore the names of Huey P. Long, then a U.S. Senator, and Governor Oscar K. Allen, who was Long's protege, and it read as follows:

> The lying newspapers are continuing a vicious campaign against giving the people a free right to vote. We managed to take care of that element here last week. A tax of 2 percent

This Court did not ignore that factual background, for it said:

> The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. *It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information* to which the public is entitled in virtue of the constitutional guaranties.

297 U.S. at 250. (Emphasis added.)

Subsequent decisions by this Court and other courts have long recognized that the plainly illicit purpose on the face of Louisiana's license tax was a chief reason for its unconstitutionality. In *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946), a case which upheld application of the Fair Labor Standards Act to a small daily newspaper while exempting small weekly and semiweekly newspapers, this Court said:

> The *Grossjean* case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation.

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on what newspapers take in was placed upon them. That will help their lying some. Up to this time they have never paid any license to do business like everybody else does. It is a system that these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2 cents a lie.

Appellee's brief, *Grossjean v. American Press Co.*, p. 9.

Of course, there is not a single piece of similar evidence in the present case. The wishful attempt by *Amici* ACLU, MCLU and MCAC in their brief to construct some sinister conspiracy behind Minnesota's tax is nothing more than extra-record speculation.

> No such vice inheres in this legislation. . . . [T]he exemption of small weeklies and semiweeklies *is not a "deliberate and calculated device" to penalize a certain group of newspapers.*

327 U.S. at 184. (Emphasis added.)

In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), a case upholding an ordinance prohibiting newspapers from carrying sex designated help wanted ads, this Court recognized *Grossjean* as one of the leading authorities in the area, 413 U.S. at 382-383, but then distinguished it by saying quite simply:

> [N]o suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press.

413 U.S. at 383.

In *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), this Court reiterated that:

> *Grossjean* involved a challenge to a state tax on advertising revenues of newspapers, the *"plain purpose" of which was to penalize the publishers and curtail the publication of a selected group of newspapers.*

438 U.S. at 9. (Emphasis added.)

See also Lee Enterprises v. Iowa State Tax Commission, 162 N.W.2d 730, 755 (Iowa, 1968); *Giragi v. Moore*, 49 Ariz. 74, 85-86, 64 P.2d 819, 823 (Lockwood, J., concurring), *appeal dismissed*, 301 U.S. 670 (1937); and L. Tribe, *American Constitutional Law*, § 12-5 at 593, n. 8, and § 12-31 at 724, n. 10.

Since neither the record in this case, nor the face of Minnesota's law, reveals a punitive purpose or restrictive intent behind the tax, and since the tax is neither tied directly to circulation nor constitutes a discriminatory license tax upon the business of publishing, it is clear that Minnesota's statute does not fall within the type of taxation proscribed by *Grossjean*.

Star Tribune's analysis of *Grossjean* consists of little more than an attempt to label Minnesota's law with the historical catch phrase "tax on knowledge". (Brief at 17-25).[7] However, this argument fails to find any factual support in the present case and is, moreover, based upon an overbroad reading of *Grossjean* itself.

There were only "two well-known and odious methods" of imposing "taxes on knowledge" which *Grossjean* condemned: (1) the stamp tax on newspapers, and (2) the English tax on advertisements. 297 U.S. at 246-247, 249. It was solely these "two forms of taxation already described", 297 U.S. at 248, which *Grossjean* held to be prohibited by the first amendment. Of course, Minnesota's use tax is neither a "stamp tax" on newspapers, nor a tax on advertisements, and Star Tribune has virtually conceded as much. (Brief at 21).

Instead, Star Tribune asserts that there was a third category of "taxes on knowledge", the English duty on paper, which the first amendment also intended to proscribe. (Brief at 19, 21). However, this Court in *Grossjean* never saw fit to mention this purported third category, and it is easy to

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[7] *Amici* ACLU, MCLU and MCAC do the same thing, and even go further by resorting to slogans in their brief such as the "big newspaper tax". This, of course, is inaccurate since the statute on its face and as construed applies to numerous types and sizes of publications besides "big" newspapers. *See*, Statement of the Case, *supra*, pp. 2-3.

see why in light of the fact that a general, non-discriminatory tax on paper would certainly not fall into the same class as the two English "taxes on knowledge". To hold otherwise would go far beyond the intended protections of the first amendment by prohibiting, *inter alia*, such ordinary forms of taxation as the federal import duty on paper imposed by Congress, apparently without constitutional challenge. *See*, e.g. *Arthur v. Moller*, 97 U.S. 365 (1878) (construing statutes imposing duties at varying rates on, *inter alia*, sized and unsized printing paper for newspapers). *See also Pott v. Arthur*, 104 U.S. 735 (1882). Today numerous types of paper, including certain types of printing paper, remain subject to federal customs duties, with newsprint being listed on the tariff schedule but specifically exempted from tax. 19 U.S.C.A. § 1202 (Tariff Schedule 2, Part 4). In short, neither the express language of *Grossjean*, nor America's own historical experience support Star Tribune's contention that a tax on paper is *ipso facto* a "tax on knowledge".

Perhaps the most objectionable feature of the English taxes, noted in *Grossjean*, but not present here, was that everyone knew that the taxes were intended to have, and had, the effect of abridging the circulation of newspapers. 297 U.S. at 246-247. Revenue was only a subordinate concern, if it was a concern at all. *Id.* Another objectionable feature of the English tax system was the gross inequality with which it was administered by officials who had virtually unfettered discretion. *See* 1 Collett, *History of the Taxes on Knowledge* (1899), 14, cited in 297 U.S. at 247. In contrast, the record herein shows no evidence of an intent to curtail the press, nor of such a result. And Minnesota's law leaves no room for discretion on the part of the officials who enforce it.

Instead of being a "tax on knowledge", Minnesota's use tax falls within the larger class of general, non-discriminatory

taxes which, although clearly imposed on the press, have nevertheless been upheld in the years since *Grossjean*. This line of cases began with *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819 (1937), *appeal dismissed*, 301 U.S. 670 (1937), which was a suit challenging an Arizona privilege tax on the sales of gross income from, *inter alia*, the business of publishing newspapers. The Supreme Court of Arizona upheld the acts as part of a general sales tax enacted for revenue raising only and without hostility to the press. This Court dismissed the appeal for want of a substantial federal question. *See also, Arizona Pub. Co. v. O'Neil*, 22 F.Supp. 117, *affirmed* 304 U.S. 543 (1938).

In *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368 (1947), *appeal dismissed*, 332 U.S. 749 (1947), a city ordinance imposed an annual business license tax upon newspapers, magazines and other periodicals or publications, based upon gross receipts, with a minimum tax of $10 per annum upon receipts from all sales and advertising, both wholesale and retail. The tax was graduated in nature because an additional $1.00 in tax was imposed for each $1,000.00 of gross sales over the first $3,000.00. The Supreme Court of Florida upheld the tax. An appeal to this Court was dismissed for want of a substantial federal question. *Compare City of Tampa v. Tampa Times Co.*, 153 Fla. 709, 15 So.2d 612 (1943) (declaring an earlier city tax tied directly to circulation to be invalid).

In *City of Corona v. Corona Daily Independent*, 115 Cal. App.2d 382, 252 P.2d 56, *cert. denied*, 346 U.S. 833 (1953), a general municipal business license tax upon the business of newspaper publications was upheld. Similarly, in *Alaska v. Journal Printing Company*, 135 F.Supp. 169, 15 Alaska 676 (1955), the federal district court upheld an Alaskan business license tax imposed upon a newspaper which required an initial annual license fee of $25, plus a sum equal to 1/2% of the gross receipts of each business in excess of the first $20,000 in annual gross receipts.

In *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1, *appeal dismissed*, 358 U.S. 39 (1958), the well-known author and playwright John Steinbeck challenged the application to his profession of a general New York gross receipts tax upon the carrying on of any trade, business, profession, vocation or commercial activity wherein the gross receipts exceeded $10,000.00 per annum. His challenge was based in part upon freedom of the press grounds. However, the New York Court of Appeals upheld the constitutionality of the law, and this Court dismissed the subsequent appeal for want of substantial federal question. *Accord, Saltzman v. U.S.*, 516 F.2d 891 (9th Cir., 1975) (federal communications excise tax); *Lee Enterprises Inc. v. Iowa State Tax Commission*, 162 N.W.2d 730 (Iowa, 1968) (3% tax on newspaper advertising); and *Donnelly Corp. v. City of Bellevue*, 283 Ky. 152, 140 S.W.2d 1024 (1940) (occupational license tax).

C. Minnesota's Use Tax Meets The Balancing-Of Interests Test Applicable In First Amendment Cases When The Assailed Law Is Non-Content Related, Serves An Important Government Interest, And Leaves Full Opportunities For Free Expression By The Press.

1. The Balancing-Of-Interests Test Is Applicable In This Case.

While this Court has always recognized the important interests protected by the first amendment, it has never adopted a theory under which the rights protected by that amendment are considered as absolutes. *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1961); *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). The commercial press in particular, like every other business enterprise, has been held subject to the incidental burdens imposed by law which life in an organized society requires.[8] Thus, in *Associated Press v. NLRB*, 301 U.S. 103 (1937), this Court pointed out that:

> The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. *Like others he must pay equitable and nondiscriminatory taxes on his business.*

301 U.S. at 132-133. (Emphasis added.)

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[8] In *Cox v. New Hampshire*, 312 U.S. 569 (1941), Chief Justice Hughes remarked in the context of a first amendment case:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.

312 U.S. at 574.

More recently, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), this Court also said:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.

408 U.S. at 682-683.[9]

In substance, Minnesota's use tax on paper and ink is just such an "incidental burden", imposed as part of a general sales and use tax law. Far from being an abridgment of press freedom, the tax is simply a non-content related method of raising needed revenues for the significant government purpose of funding Minnesota's public school aids program. *See*, Argument I A, *supra*. Under this Court's previous decisions such a law can pass constitutional muster if it meets the balancing-of-interests test.

The balancing-of-interests test evolved from the recognition that government usually abridges freedom of the press in one of two ways: (1) by directly restricting the content of the publication, or (2) by restricting the flow of information as

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[9] *Accord, Pittsburgh Press Company, supra*, 413 U.S. at 382-383. *Cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 565-566 (1978) (First amendment provides to newspapers no greater freedom from proper search warrants than that of the general public); *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978) (First amendment grants the press no right to information about a trial superior to that of the general public); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (The press has no first amendment right of access to prisons beyond that afforded the general public).

a side effect of attempting to achieve other purposes. *See* L. Tribe, *American Constitutional Law*, § 12-2 at 580. An example of a content related regulation is one which specifically prohibits particular statements as the primary objective. *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974).

The second kind of government action, non-content related, is typified by a governmental restriction aimed at achieving a legitimate objective of government, such as safety, health, or raising revenue, with an incidental effect on first amendment rights. Examples would be ordinances which prohibit the use of loudspeakers in residential areas or picketing near schools. *See Grayned v. Rockford*, 408 U.S. 104 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

As to the content related type of law, there is a presumption that it is violative of the first amendment and, thus, must meet the highest standard of constitutional scrutiny. But, a governmental restriction not related to content is subject to a less stringent, balancing-of-interests test. *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961) (rules which only limit the performance of speech activities can be justified by countervailing governmental interests); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (rules not aimed at specific information are acceptable so long as they do not "unduly constrict" the flow of ideas).

The balancing-of-interests test has been stated in several ways. For example, when the issue is the validity of a reasonable time, place and manner regulation on a public forum, the regulation is justified if it is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication. *Heffron v. Intn'l. Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-

648 (1981); *Virginia State Board of Pharmacy v. Virginia Citizen Consumer Council*, 425 U.S. 748, 771 (1976). As this Court noted just last Term: "limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech [citation omitted] would *not* be subjected to . . . strict scrutiny". *Globe Newspaper Co. v. Superior Court*, —— U.S. ——, —— n. 17, 102 S.Ct. 2613, 2620 n. 17 (1982). (Emphasis added.)

In cases such as the present one, where the content-neutral statute in question has a much less direct effect on communication than a "time, place and manner" regulation, this Court has adopted an even less rigid test in which it balances the first amendment interest in maintaining a free flow of communication and ideas against those governmental interests served by the statute. *U. S. Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981); *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).[10] In the *O'Brien* case, where this Court upheld the anti-draft card burning statute against first amendment attack, the following language was used in applying the balancing test:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

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[10] Professor Tribe notes that this balancing test requires only that the government "show no more than a rational justification" for its statute so long as there are ample means left available to communicate. L. Tribe, *American Constitutional Law*, § 12-20 at 684.

That Minnesota's use tax on paper and ink is content-neutral is beyond question. Therefore, it is constitutional if it can meet the balancing-of-interests test. To do so, the state need only show that: (1) the tax serves an important government interest that is within the state's constitutional power, and (2) the tax is unrelated to the suppression of free speech and, in fact, allows full opportunity of communication to the commercial press.

2. The Tax Serves The Important Government Interest Of Raising Revenue, Which Is Clearly Within The State's Constitutional Power.

In its opinion below, the Minnesota Supreme Court spoke of revenue-raising as "perhaps the most compelling goal of a state government." 314 N.W.2d at 207. (A. 13). This proposition is so obvious that it hardly needs supporting authority, for revenue is the very lifeblood of any government's operation. The raising of revenue clearly constitutes an important, significant and substantial government interest.

From the founding days of our Republic it has been recognized that revenues are essential to government. In *The Federalist No. 12*, p. 84 (Bourne ed. 1947) it was written that:

> A nation cannot long exist without revenues. Destitute of this *essential* support, it must resign its independence, and sink into the degraded condition of a province. This is an extremity to which no government will of choice accede. *Revenue, therefore, must be had at all events.*

(Emphasis added.) *See also The Federalist Nos. 31, 32 and 34.*

In *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527 (1931), this Court stated as a well settled principle that:

> The power of taxation is *fundamental* to the very existence of the government of the states.

283 U.S. at 537. (Emphasis added.)

Accord, United States v. Lee, —— U.S. ——, ——, 102 S.Ct. 1051, 1056 (1982) (The broad public interest in a sound tax system is of such a high order that even religious belief in conflict with payment of taxes affords no basis for nonpayment); *Providence Bank v. Billings*, 29 U.S. 514, 4 Pet. 514 (1830) (The taxing power is of vital importance and is essential to the existence of government).

Not only is taxation fundamental, but it is within the state's constitutional powers as "an incident of sovereignty". *McColloch v. Maryland*, 4 Wheat. 316, 429 (1819).

In short, revenue-raising is a substantial government interest because "Taxes are what we pay for civilized society". *Compania General de Tabacos v. Collector*, 275 U.S. 87, 100 (1927) (Justice Holmes dissenting). In the present case, this interest is even more compelling because the purpose behind Minnesota's taxation of paper and ink in 1971 was to help fund an important new program of local school aids aimed at creating equality of educational opportunity throughout the state. *See* Argument I A, *supra*.

It is constitutionally irrelevant to suggest that Minnesota could have obtained greater revenues from some source other than a use tax on paper and ink (Brief at 5-6), because the same argument can be made against all taxes that happen to affect publications. The taxing power extends to "All sub-

jects over which the sovereign power of a State extends", *McColloch v. Maryland, supra*; and if Minnesota were required to tax everything else in its jurisdiction before it could collect a tax from publications, then publications would never be subject to taxation. The Constitution clearly does not require such an extreme result. *Cf. Nixon v. Administrator of General Services*, 433 U.S. 425, 471 (1977) (Legislatures are not limited to "legislating for the universe, or legislating only benefits, or not legislating at all").

3. The Tax Is Totally Unrelated To Suppression Of Free Speech And Allows Full Opportunity Of Communication To The Press.

As previously shown, Minnesota's use tax on paper and ink is totally unrelated to any suppression of free speech. There is not a shred of evidence to show that the purpose behind this tax was to muzzle or otherwise intimidate the free press.[11] The law on its face neither prohibits nor regu-

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[11] Indeed, if that was its purpose Minnesota's use tax has been singularly unsuccessful in achieving it. The Appellant has neither suggested nor presented any evidence to support a conclusion that Minnesota's tradition of vigorously independent political reporting has in any way been diminished over the almost eleven years since the use tax on paper and ink was first enacted.

The inference in the brief of *Amici* ACLU, MCLU and MCAC, that the recent merging of the afternoon Star with the morning Tribune was somehow related to the passage over ten years ago of the use tax herein, is completely unsupported by anything either in this record or outside of it. In fact, the Star was still a viable profit-making operation when its management voluntarily decided to merge it with the Tribune. *See* Minneapolis Star, March 24, 1982, p. 5A, col. 2. Furthermore, the Star's merger can be attributed much more directly to the nation-wide problems facing all afternoon dailies (*see* Brief of *Amici* Knight-Ridder Newspapers, Inc. and ANPA, p. 2, n. 2), than to Minnesota's relatively modest tax.

lates the gathering, printing and dissemination of news and opinion. Nor is imposition of the tax dependent on either a government official's discretion, or the content of any particular publication.

The only requirement this tax places on any person or corporation wishing to commercially publish in Minnesota, is that they pay an ordinary use tax at the general rate when they purchase their supplies of paper and ink. This is no different than the case of an individual printing hand bills in his basement for free distribution, who has always had to pay sales or use tax on the paper and ink he buys in a retail store. No one could seriously argue that such an individual's first amendment right to print hand bills was being impinged. Likewise, a publication's right to print its product is simply not affected by a content neutral use tax on its commercial purchases of paper and ink. There is no reason to grant newspapers a "special" privilege under the first amendment, beyond that accorded to individual hand bill printers. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 798-802 (1978) (Chief Justice Burger, concurring).

Like any item of overhead, Minnesota's tax can simply be absorbed or passed-on as an ordinary cost of doing business. Thus, the tax is no more of a muzzle on the ability of the press to communicate than are ad valorem property taxes on a newspaper's buildings, gasoline and tire excise taxes on a newspaper's delivery trucks, or the federal communications excise tax on a newspaper's local telephone service (*See* 26 U.S.C. § 4251 and § 4253(b)). All these taxes are but incidental costs of conducting a business in today's commercial world, and are ordinarily borne by any publisher.

Consequently, when Minnesota's substantial interest in raising revenue for an important government program is

weighed against the minimal impact on the ability of publications to print news and information, it follows that the use tax in question does not violate the freedom of the press guaranteed in the first and fourteenth amendments.

II. MINNESOTA'S USE TAX ON PAPER AND INK IS CONSTITUTIONAL UNDER THE EQUAL PROTECTION PROVISION OF THE FOURTEENTH AMENDMENT.

A. As A Non-Content Related Law Of General Application The Tax In Question Is Subject To The "Any Rational Basis" Standard Of Review, Even Though It Can Also Withstand Strict Scrutiny.

In its opinion below the Minnesota Supreme Court upheld Minnesota's use tax under the strict scrutiny standard of equal protection review. 314 N.W.2d at 205. (A. 8). Even though Appellee agrees with that result, we nevertheless think that the Minnesota Supreme Court went further than it was required to go. While the tax can survive strict scrutiny, it is not required to. The traditional "any rational basis" test is the only correct standard for review.

This Court has described the point at which traditional equal protection analysis gives way to the higher level of strict scrutiny by using different language in different cases. But perhaps the most common formulation is found in *Massachussetts Board of Retirement v. Murgia*, 427 U.S. 311 (1976):

> [E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification

> impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.

427 U.S. at 312.

Here there is no intimation that any "suspect class" is involved. Therefore strict scrutiny can be invoked only if it is shown that the use tax "impermissibly interferes with the exercise of a fundamental right." *Id.*

This, in turn, requires a finding that the thing being taxed, i.e. the purchase of paper and ink, is itself a fundamental right. We submit that it is not, for such purchases are simply part of the numerous business activities going into the commercial enterprise of printing a newspaper, or a trade journal, or a serialized comic book.

While Star Tribune undoubtedly has the fundamental right to print what it chooses, without content related regulation, it does not follow that all the business activities going into Star Tribune's enterprise are *ipso facto* fundamental rights. If that were true, *any* government regulation or taxation of those activities would be subject to strict scrutiny if there were the least bit of classification involved. Whether the law is an income tax, a property tax, fair labor laws or simply building codes, a commercial publication would likely avoid the law's effect altogether by simply shifting the burden of proof to the government and requiring it to show that one of its "compelling interests" can be served only by the particular statute in question. *Cf. United States v. Lee*, —— U.S. ——, ——, 102 S.Ct. 1051, 1057-1958 (1982) (Justice Stevens concurring).

Such a result is clearly not within the intent of the first amendment, for it is well settled "that the First Amendment

does not invalidate every incidental burdening of the press." *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972). This principle would be ill-served by a theory such as Star Tribune's, which essentially holds that everything a newspaper does is a "fundamental right", the taxation of which is always subject to strict scrutiny. Both Star Tribune and *Amici* place undue reliance on this Court's language in *Citizens Against Rent Control v. City of Berkeley*, —— U.S. ——, ——, 102 S.Ct. 434, 436 (1981) ("regulation of First Amendment rights is always subject to exacting judicial review"). That case is distinguishable as involving a regulation directly aimed at limiting free speech. In contrast, Minnesota's use tax is even less restrictive of communication than the "time, place and manner" laws which this Court has often said would *not* be subjected to strict scrutiny. *Globe Newspaper Co. v. Superior Court*, —— U.S. ——, ——, n. 17, 102 S.Ct. 2613, 2620 n. 17 (1982).

We submit that the correct view of what is a fundamental right is one which recognizes the nature of the activity involved; analyzes the extent to which the activity is being affected (i.e. incidental, significant, or prohibitive), and determines how directly connected that activity is to the ultimate first amendment interest of insuring free communication of information and ideas. Since, in the present case, we have an ordinary business transaction (purchases of paper and ink), that is only indirectly related to actual communicative acts, being taxed under a general law that is both non-content related and non-prohibitive of the activity itself, it hardly merits treatment as a "fundamental" right.

Moreover, even if it were conceded, *arguendo*, that the commercial purchase of paper and ink is a fundamental right, under *Murgia, supra*, strict scrutiny is invoked only when the law "impermissibly interferes" with that right. The record herein fails to establish any substantial interference with Star Tribune's purchase of paper and ink, much less an impermissible one. A mere economic effect on newspapers does not mean the functions of the press are being interfered with. *Cf. United States v. New Mexico*, —— U.S. ——, 102 S.Ct. 1373, 1382 (1982) (Tax immunity is not conferred "simply because the tax has an effect on the U.S."); and *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 222-225 (1928) (Justice Holmes, dissenting).

In *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946), this Court was directly faced with an "equal protection" issue of alleged unconstitutional discrimination in the Fair Labor Standards Act, between small daily newspapers (who were held to be subject to the Act) and small weekly and semi-weekly newspapers (who were statutorily exempt under the Act).[12] In upholding the Act, this Court did not apply any sort of strict scrutiny standard of review, but in effect applied an "any rational basis" test. 327 U.S. at 184. *Accord Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 193-194 (1946). *See also Hadwen, Inc. v. Vermont Dept. of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed*, 451 U.S. 977 (1981), (Applying the "any rational basis" test in upholding Vermont's use tax on ink, newsprint and other supplies).

In short, Minnesota's use tax should not be subjected to strict scrutiny. The commercial purchase of paper and ink is not a fundamental right requiring constitutional protection of such magnitude. Instead, the any rational basis standard of review is clearly the correct one for this case.

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[12] Because the statute in *Mabee* was a federal law, the issue was raised under the Fifth Amendment rather than the Fourteenth Amendment. However, the standards of review under both Amendments are now recognized as virtually identical. *See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

B. In The Context Of Minnesota's General Sales And Use Tax Law, Imposing A Use Tax For Paper And Ink On Publications Whose End-Products Are Not Taxable, While Exempting Other Industrial Users Of Paper And Ink Whose End-Products Are Taxable, Is Not Violative Of Equal Protection.

Under Minnesota's sales and use tax system there is a substantial difference between publishers of tax exempt publications (who are subject to the use tax on paper and ink), and other industrial users of paper and ink. This difference lies in the fact that the cost of paper and ink used by ordinary manufacturers of non-exempt printed matter (e.g. pre-printed stationery, maps, books, etc.) is eventually subjected to sales and use taxation when the final product is sold at retail. Minn. Stat. § 297A.02. Therefore, it is reasonable to exempt the cost of such materials used in the industrial production of that product. Minn. Stat. § 297A.25, subd. 1(h). However, "publications" are different, because in Minnesota the end product is specifically exempted from sales and use tax. Minn. Stat. § 297A.25, subd. 1(i). Accordingly, paper and ink going into such publications is not, absent the use tax at issue herein, taxed at all.

As the Minnesota Supreme Court correctly stated in its opinion below:

> Nonpublishers pay no use tax on consumption of paper and ink, but the goods they produce are subject to retail sales tax. Theoretically, the value of the paper and ink is reflected in the retail price that forms the basis of the sales tax.
>
> . . . .
>
> By exempting industrial users from the use tax, the legislature was acting in accordance with its general

scheme to exempt component parts from the use tax when the completed product is subject to sales tax. 314 N.W.2d at 207-208. (A. 13).

Unlike paper and ink used in the usual manufacturing situation, paper and ink used for publications was exempt from taxation entirely under the statutory scheme in effect between 1967 and 1971. 13 MCAR Tax S&U 409(c)(1). (JA. 32). The tax in question simply removed this legislatively granted exemption in 1971. The sole reason for doing so was to raise revenue by providing that the cost of such paper and ink would be taxed once during the manufacturing process.

This clearly meets the any rational basis standard of review because a reasonable basis exists upon which publications and other industrial users of paper and ink are treated differently. The tax also meets the strict scrutiny standard of review because it serves the compelling state interest of raising revenue for an important state-wide program, *see* Argument I C(2), *supra*, with a non-content related classification that is suitably tailored to achieve its goal without impinging on the free flow of communications. *See Police Dept of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("As in all equal protection cases, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment").

It is hard to see how Minnesota's use tax can be a greater burden on "publications" than is the imposition of a sales tax upon the nonpublisher's sale of his final product. In fact, the burden is even smaller for tax exempt "publications" because the raw materials going into the product (i.e., paper and ink) are invariably of less value than the final product itself, therefore resulting in a lower overall tax burden. Even

under strict scrutiny there is no impermissible discrimination when the burden imposed upon one class (in this case, publications) is actually less than the burden imposed upon other classes. *California Medical Association v. Federal Election Commission*, —— U.S. ——, ——, 101 S.Ct. 2712, 2724 (1981).

Star Tribune continues to argue that a sales tax cannot be constitutionally imposed on newspapers under any circumstances, from which dubious assertion it then concludes that Minnesota cannot impose the lesser burden of the present use tax. (Brief at 34-41). In the first place, of course, the issue of whether there is a constitutionally mandated sales tax exemption for newspapers is not present in this litigation, as correctly noted by the Minnesota Supreme Court. 314 N.W.2d at 207, n. 10. (A. 13). *See also*, brief of *Amici* Knight-Ridder Newspapers, Inc. and ANPA, at 19-20. The reason is that the basic 1971 tax on paper and ink was not intended as a "compensating use tax," but was intended solely to raise revenue by removing a previous exemption. (A. 77).

But even if it were an issue in this case, there is simply no basis for such a constitutionally imposed tax exemption. Like almost all state sales taxes, Minnesota's sales tax is a general excise upon retail gross receipts from the sale of virtually all kinds of tangible personal property, with some rationally-based exemptions grounded in clearly permissible public policy (e.g., exemptions for food, clothing and school textbooks). Minn. Stat. §§ 297A.01, subds. 3 and 4, 297A.02 and 297A.25. Because newspapers are tangible personal property, they are as much subject to such a non-discriminatory, non-content related tax upon their sale as is any other item of tangible personal property.

Of course, Minnesota has chosen not to tax the sale of those newspapers which come within its statutory definition of "publications". Minn. Stat. § 297A.25, subd. 1(i). But this

does not mean that it was constitutionally required to do so.[13] Other states have taxed the sale of newspapers under their general laws, apparently without constitutional challenge, as noted by both the Minnesota Supreme Court, 314 N.W.2d at 207, n. 10 (A. 13), and *Amici* Knight-Ridder Newspapers, Inc. and ANPA in the appendix to their brief. Moreover, the question of a constitutionally required tax exemption cannot be confined to newspapers alone. We would also have to include such traditionally taxable items as books, legal briefs, catalogues, corporate reports, commercial handbills—in short, all other printed matter subject to first amendment protection—in the discussion, for there is little reason to believe the newspapers alone are entitled to "special" privileges under the first amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 798-802 (1978) (Chief Justice Burger, concurring). To say that this whole vast category of commercial enterprise is to be constitutionally exempted from general state sales taxes would go far beyond what the framers of the first and fourteenth amendments ever intended.

In *Cammarano v. United States*, 358 U.S. 498 (1959), no less a defender of the first amendment than Justice Douglas concurred in holding that money spent by businesses to defeat proposed initiative measures could not be deducted for income tax purposes as "ordinary and necessary" business expenses. Even though Justice Douglas was of the opinion that the taxpayers were exercising their first amendment rights, he rejected the notion that they were thereby constitutionally entitled to the deductions:

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[13] Nor did the Minnesota Attorney General's Opinion (1948 Op. Atty. Gen No. 90, June 11, 1948), cited by *Amici* ACLU, MCLU and MCAC on p. 53 of their brief, require such a result. That opinion simply said that a proposed city excise tax imposed on newspapers *alone*, and not upon all businesses generally, would be invalid.

> Deductions are a matter of grace, not of right. . . . To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a motion runs counter to our decisions.

358 U.S. at 515 (Justice Douglas, concurring) (Citations omitted). *Cf. Bob Jones University v. Simon*, 416 U.S. 725, 748-749 (1974).

Because there is nothing in either the first or fourteenth amendments which would prevent a state from imposing a non-discriminatory, non-content related sales tax on publications, we fail to see how the imposition of a lesser tax on only their purchases of paper and ink can be unconstitutional.

Star Tribune also argues that there exist other industrial users of paper and ink (e.g., printers of milk cartons and school textbooks) whose final products are exempt from sales tax, but who are not subjected to the use tax on paper and ink. (Brief at 49). However, Minnesota is not constrained to exempt all items of property from taxation, or none at all. Tax exemptions are not all in one class. Rather, each rests upon a different basis and legislatures have long had broad power to grant exemptions for the purpose of "fitting tax programs to local needs in order to achieve an equitable distribution of the tax burden". *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Thus, Minnesota is permitted to decide that its common good would be enhanced if certain items such as food (and the packaging for food), and school textbooks, remain totally exempt from its sales and use tax, without at the same time giving up its right to lay some tax on publications under an otherwise general tax system. For a similar treat-

ment of this issue, see *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), where this Court dismissed out-of-hand an argument that the exemption of seamen and farm workers, but not newspaper employees, from the Fair Labor Standards Act resulted in an unconstitutional discrimination against newspapers. 327 U.S. at 193. *See also, Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

C. There Is No Unconstitutional Discrimination In The Fact That Minnesota's Use Tax On Paper And Ink Cannot Be Imposed On Foreign Publications.

One of Star Tribune's more novel arguments is that Minnesota's use tax unconstitutionally discriminates in favor of foreign publications, who do not have to pay the tax because they do not buy their paper and ink in Minnesota. (Brief at 46-47). This line of reasoning, of course, completely fails to take into account the possibility that foreign publications may be paying business taxes in their home states above and beyond the taxes Minnesota imposes on its domestic publications. Even if they are not paying such taxes now, foreign publications are at any rate subject to such impositions by their home states at any time.[14]

However, the more fundamental response to Star Tribune's argument lies in the fact that Minnesota simply has no power to impose its use tax on the foreign purchase of paper and ink by reason of the due process clause of the fourteenth amendment. If this is a discrimination at all, it is not of Minnesota's doing; but rather is a natural product of our federal system, where states may only tax that over which they have jurisdiction.

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[14] *See, e.g.*, the New York City General Business and Financial Tax upheld in *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1 (1958), *appeal dismissed*, 358 U.S. 39 (1958).

In *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157 (1940), the taxpayer railroad made a similar equal protection argument in challenging Minnesota's railroad gross earnings tax. The railroad claimed that its nominal trackage in Minnesota (only 30 miles) subjected it to the gross earnings tax, while other foreign railroads having no trackage in Minnesota paid no tax even though they earned substantial revenues from rentals of cars for use in Minnesota. 309 U.S. at 162. This Court rejected that argument in succinct fashion, saying:

> As to appellant's second objection under this head, little need be said. Companies not owning or operating roads within the state are not reached by this tax statute; roads that do, are. That certainly is not discrimination in the constitutional sense. Appellant has subjected itself to the jurisdiction of Minnesota. Those doing likewise are similarly treated by the state, as are domestic companies engaged in that business. The fact that that entails burdens is a part of the price for enjoyment of the privileges which Minnesota extends.

309 U.S. at 163-164.

The decision in *Illinois Central R. Co.*, is dispositive of Star Tribune's argument on this point.

D. The $100,000 Exclusion Provision Does Not Violate Equal Protection Because It Is In Effect A Non-Discriminatory Tax Credit, Which Is Non-Content Oriented, And Reasonably Related To A Substantial Government Purpose.

The $100,000 exclusion added to the tax in 1973 is, on its face and in substance, a non-discriminatory provision which applies equally to all producers of tax exempt publications.

In effect, it is a $4,000 tax credit generally applicable to all taxpayers who come within the act.[15] Each producer of a publication, large or small, is entitled to subtract the same $100,000 from its cost of purchasing paper and ink before calculating the amount of use tax due. In fact, Star Tribune received two such $100,000 exclusions, one for its morning and one for its evening edition. 314 N.W.2d at 203, n. 3. (A. 4).

Moreover, the $100,000 exclusion is available totally without reference to the content of any particular publication. At the outset, then, the $100,000 exclusion can be set apart from the content related classifications struck down by this Court under the strict scrutiny standard of review in cases such as *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972). Nor is the exclusion prohibited under any reading of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) on the ground that size alone is an invidious discrimination. As this Court held in *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946):

> Nothing in the Grosjean case forbids Congress to exempt some publishers *because of size* from either a tax or a regulation which would be valid if applied to all. 327 U.S. at 194. (Emphasis added.)

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[15] In this regard it is not unlike the political contribution tax credit of $50 ($100 in the case of joint returns) allowed against the federal income tax by 26 U.S.C. § 41. Small contributions of $50 or less get full advantage of the tax break, whereas larger contributors only get the same advantage up to $50, but thereafter get no tax benefit with regard to larger contributions. To our knowledge this credit has never been challenged on either equal protection or First Amendment grounds.

When the $100,000 exclusion is recognized for what it is, a content-neutral rule equally applicable to all publications, it can hardly be thought an arbitrary or invidious discrimination violative of the fourteenth amendment. As is the case with all general rules of taxation, it is possible that its application to different persons will result in different tax liabilities. But this does not, in itself, make the general rule unconstitutional. The fourteenth amendment guarantees only equal laws, not necessarily equal results. *Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979). *See Mouledoux v. Maestri*, 197 La. 525, 2 So.2d 11, 21 (1941) (sales and use tax graduated by size of purchase upheld because the cut-off points applied equally to all).

The fact that the $100,000 may result in a graduated tax rate is irrelevant, so long as the rule applies equally to all. In *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87 (1935), this Court upheld a West Virginia chain store license tax which was even more steeply graduated than Minnesota's use tax. That tax was imposed on each store at the rate of $2 for one store, $5 for two to five stores, $10 for six to ten stores, $20 for ten to fifteen stores, $30 for fifteen to twenty stores, $35 for twenty to thirty stores, $100 for thirty to fifty, $200 for fifty to seventy-five, and $250 on each store in excess of seventy-five. The net result of these graduated rates was that the five largest chain store operations in West Virginia, all owned by oil companies, accounted for 83.5% of the total license taxes paid to the state in one year, and the Standard Oil Co. alone paid 42.16% of the total state tax. 294 U.S. at 92. In rejecting the claim that West Virginia's tax was a violation of equal protection because of its varying impact, Mr. Justice Cardozo wrote for the Court:

> We have never yet held that government in levying a graduated tax upon all the members of a class must satisfy itself by inquiry that every group within the class will be able to pay the tax without the sacrifice of profits. The operation of a general rule will seldom be the same for everyone. *If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.*

294 U.S. at 102. (Emphasis added.)

Such is also the case with the $100,000 exclusion provision in Minnesota's use tax. It is a rule applicable to all members of the same class, and if the course of successful commercial enterprise causes some publications within that class to purchase more than $100,000 in paper and ink per year, the resulting tax is due solely "to the exigencies of business and not to those of law". *Id.* 294 U.S. at 101.

In addition to being non-discriminatory on its face, the $100,000 exclusion is also reasonably related to the substantial government interest of raising revenue within an equitable tax system, while at the same time advancing the first amendment's own special concern for "the poorly financed causes of little people" *Martin v. Struthers,* 319 U.S. 141, 146 (1943). *Cf. Associated Press v. United States,* 326 U.S. 1 (1945) (application of Sherman Anti-Trust Act to news media justified to prevent large combinations of publishers from driving out smaller publishers).

The $100,000 exclusion is an integral part of the basic use tax, and is intended to be part of an equitable and sound tax system. As the Minnesota Supreme Court aptly said below:

> [I]t is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order

> to do so, the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state.

314 N.W.2d at 209. (A. 17 to A. 18).

Even under strict scrutiny the state has, as a corollary to its compelling interest of raising revenue, an equally compelling interest in seeing that its revenue is raised under an equitable system of taxation so as not to subvert the revenue raising purpose.

One reason behind the $100,000 exclusion was expressly mentioned by the Court below:

> [A] use tax exemption for the first $100,000 of paper and ink consumed may be justified as a legislative policy to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered).

314 N.W.2d at 209. (A. 17).

The $100,000 exclusion is a benefit, not a penalty. Furthermore, it is non-content related and non-regulative. Therefore, its validity should be judged by the same criteria as other benefits granted by government to small businesses. No one can seriously argue that the federal Small Business Administration would be precluded from granting a loan on favorable terms to a small publisher, simply because it does not also grant loans to large media corporations like the Star Tribune. Likewise, Minnesota is not constitutionally prevented from lessening the tax burden on smaller publications through an across-the-board exclusion of $100,000, a benefit that is, in any event, equally applicable to large publishers.

Another justification for the exclusion is that larger businesses, by their nature, impose more social costs than do small business operations. The state therefore has a reasonable basis for imposing upon large business a greater tax burden to defray such costs. *Cf. New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 583 (1938) (Justifying a gross receipts tax because "the volume of transactions indicated on the taxpayer's books may bear a closer relation to the cost of governmental supervision and protection than the annual profit and loss statement").

Yet another reason for the exclusion is that larger businesses have more assets and receive greater revenues than smaller businesses. Thus, they would be better able to pay the tax and either absorb or pass on the cost. Ability to pay has long been accepted as a ground for distinction in tax law.

Finally, large publishers are more likely to be located in highly populated metropolitan areas (*see* Affidavit of Shaw, para. 8, JA. 26) which provide both high circulation and advertising revenue possibilities. On the other hand, small newspapers are often located in predominately rural areas where circulation and advertising possibilities are more limited. The tax collected from many of them would be virtually *de minimus*. Because these two groups serve two different kinds of constituencies, they are not in direct competition with each other. Giving an equal tax credit to both classes simply will not result in one's voice being enhanced over the other.

This is why Star Tribune's reliance on *Buckley v. Valeo*, 424 U.S. 1 (1976) is misplaced. As the Minnesota Supreme Court accurately noted:

> *Neither the purpose nor the effect of section 297A.14 is to enhance the voice of one newspaper relative to another newspaper.* The expenditure limitations found un-

> constitutional in *Buckley* were restrictions upon the total amount of money that could be spent by persons during a campaign. Such limitations were "substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. *By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount.* The use tax may theoretically reduce the amount of money they may spend by reducing available capital. But all taxes do as much. There is nothing special about this form of taxation which elevates to a constitutional plane these theoretical effects on "quantity" or "diversity."

314 N.W.2d at 210. (A. 18 to A. 19). (Emphasis added.)

As mentioned earlier, the $100,000 exclusion is far more comparable to the $50/$100 political contribution credit found in the Internal Revenue Code than it is to the "independent expenditure" limits in *Buckley v. Valeo, supra,* which this Court found to be "*direct* and *substantial* restraints on the quantity of free speech." (Emphasis added.) *Id.* 424 U.S. at 39. The $100,000 exclusion is neither a direct nor substantial restraint of actual communicative acts. It is but an across-the-board credit available to all publishers, large and small. Nor is the exclusion a "penalty" as implied by Star Tribune. (Brief at 30-31). Receiving a credit of $4,000 on one's tax bill ($8,000 in the case of the Star Tribune) simply cannot be considered a "penalty" under any definition of that term.

Star Tribune's further contention that *Stewart Dry Goods v. Lewis,* 294 U.S. 550 (1935) is applicable herein, Brief at 31-33, is also misplaced, because that case dealt with a tax totally different from the one at issue herein. In *Stewart Dry Goods,* the tax was on the privilege of doing business as a retailer,

measured by gross receipts. The Court held that the purported justification for the graduated nature of tax (e.g. the value of the business privilege increasing with volume of sales) did not bear any relation with the actual tax. Minnesota's use tax however is not based upon the ongoing privilege of doing business. Nor does it purport to tax the profitability of a business. It is simply a one-time tax upon each act of purchasing and using tangible personal property, in the same manner as is the rest of Minnesota's general sales and use tax.

Moreover, the continued validity of the rigid grounds upon which *Stewart Dry Goods* was decided is today open to serious question in view of this Court's more recent view of the need for allowing flexibility in fashioning state tax systems. *See e.g. Kahn v. Shevin*, 416 U.S. 351, 355 (1974); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); and *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-527 (1959). Indeed, the *Stewart Dry Goods* opinion itself has hardly been mentioned again by this Court except to distinguish it. *See New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 583-584 (1938). *See also* Nowak, Rotunda and Young, *Constitutional Law* (1978) p. 364 ("An objective appraisal of *Stewart Dry Goods* leads one to doubt whether the majority view would prevail today").

Thus, it is entirely appropriate to suggest that the views of the three dissenters in *Stewart Dry Goods* (Justices Cardozo, Brandeis and Stone) represent today's more enlightened attitude toward fourteenth amendment state tax cases:

> The large dealer, it is said, occupies, both absolutely and relatively, a position of economic superiority by reason of the volume of his business. In that view, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus to arrive in the

> end at a more genuine equality. By the statute in controversy the commonwealth of Kentucky is aligned with that position. It is not the function of a court to make itself the arbiter between competing economic theories professed by honest men on grounds not wholly frivolous.

294 U.S. at 569. (Justice Cardozo dissenting).

To the extent that the $100,000 exclusion in this case cannot be distinguished from the tax in *Stewart Dry Goods*, we respectfully submit that now is the time for *Stewart Dry Goods* itself to be overruled, thereby finally setting aside the pre-1937 notion that this Court should be in the business of second-guessing legislatures on the economic theories underlying their legislation. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (Legislatures, not courts, should decide on the wisdom and utility of legislation).

CONCLUSION

For the reasons stated herein, the judgment of the Minnesota Supreme Court should be affirmed in all respects.

Respectfully submitted,

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FILED
NOV 15 1982
ALEXANDER L. STEVAS,
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No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

REPLY BRIEF OF APPELLANT

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NOTE AS TO ABBREVIATIONS

Throughout this Brief, appellant will use these abbreviations:

"A—" refers to pages in the Appendix to Jurisdictional Statement.

"JA—" refers to pages in the Joint Appendix.

"Motion at —" refers to pages in the Appellee's Motion to Dismiss.

"State's Brief at —" refers to pages in the Brief of Appellee Minnesota Commissioner of Revenue.

"ACLU-MCLU-MCAC Brief at—" refers to pages in the Brief of the American Civil Liberties Union, the Minnesota Civil Liberties Union and the Minnesota Coalition Against Censorship, *amici curiae*.

"Knight-Ridder/ANPA Brief at—" refers to pages in the Brief of Knight-Ridder Newspapers, Inc. and the American Newspaper Publishers Association as *amici curiae*.

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REPLY BRIEF OF APPELLANT

INTRODUCTION

Since submitting its Motion to Dismiss, the State has developed two entirely new arguments for sustaining the constitutionality of the challenged use tax:

First, the State contends that the challenged use tax is not "content-related": it does not expressly tax the exercise of free press rights because it does not directly af-

fect the subject matter that a publisher of a Minnesota newspaper subjected to the tax may publish.

Second, the State contends that the challenged use tax should be reviewed under a "balancing of interests" standard, rather than the "strict scrutiny" standard which the Minnesota Supreme Court recognized to be proper. Applying this relaxed standard of review, the State argues that the tax is constitutional because it is an exercise of the State's power to tax irrespective of the consequence or effect of the tax.

The State also reasserts its argument that the challenged use tax is textually neutral, and thus nondiscriminatory. From this, the State attempts to demonstrate that the tax is constitutional, notwithstanding its proven discriminatory effect upon only a dozen or so publishers of Minnesota's largest-circulation daily newspapers.

Star Tribune will address these arguments in order.

ARGUMENT

I. The State's "Content-Related" Argument Does Not Save the Challenged Use Tax.

A. The State's "Content-Related" Argument Has No Support in Tax Cases Involving First Amendment Issues.

The State devotes considerable effort to establishing and repeating two undisputed, but irrelevant, points: the State must raise revenue, and the challenged use tax addresses that need. (*See, e.g.*, State's Brief at 9, 13, 28-30, 37-40, 45-46.) The State recognizes, as it must, that its power to impose taxes

is restricted by the Federal Constitution, including the First Amendment. (*See* State's Brief at 15-18.) However, it seeks to avoid any meaningful restrictions on its taxing power by contending that, unless a tax is expressly "content-related," the First Amendment requires only a "balancing of interests" analysis in which the State's need for revenue inevitably is paramount.

The State has not cited any decision which limits the First Amendment's prohibitions on the states to "content-related" taxes, and there are none. Star Tribune is unaware of any tax which has been imposed directly upon communication based upon the content of that communication, no doubt because such a crude attempt to impose a "tax on content" is so obviously improper that it is unlikely to survive consideration by any sensitive legislative or executive body.[1]

To reduce the First Amendment's freedom of the press protection in the taxation area to a prohibition of only "content-related" taxes would be to ignore what this Court has long recognized: that the First Amendment is concerned with protecting the quantity of speech and its manner of dissemination, as well as its specific content. For example, in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), this Court struck

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[1] In a few cases, the government has granted or denied special exemptions or deductions from general taxes based either upon the specific content of a communication, *e.g., Speiser v. Randall*, 357 U.S. 513 (1958), or upon the general nature of communicative activity, *e.g., Cammarano v. United States*, 358 U.S. 498 (1959); *Taxation with Representation of Washington v. Regan*, 676 F.2d 715 (D.C. Cir.) (*en banc*), *probable jurisdiction noted*, No. 81-2338, 51 U.S.L.W. 3253 (Oct. 4, 1982). Nondiscriminatory denials of deductions from general taxes raise different constitutional issues than do even nondiscriminatory direct taxes on protected activity. (*See* Brief of Appellant at 27-28.)

down a tax which interfered with the circulation of *all* information, not just information with specified content. More recently, this Court has repeatedly invalidated broad restrictions on the volume or extent of communication, despite the fact that those restrictions, at least on their face, did not discriminate based upon the specific content of communication. *Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976). As Chief Justice Burger elaborated in his concurring opinion in *Bellotti*:

> There is no fundamental distinction between expression and dissemination. The liberty encompassed by the Press Clause . . . merited special mention simply because it had been more often the object of official restraints. (435 U.S. at 800.)

The State attempts to trivialize Star Tribune's First Amendment rights in this case by arguing that "the commercial purchase of paper and ink" is not a fundamental right. (State's Brief at 35.) But the State consciously ignores the use to which the taxed paper and ink is put. Every means by which newspapers can increase the flow of information to the public—increasing pages, increasing frequency of publication and increasing circulation—requires increased consumption of paper and ink, the two commodities essential to publishing a newspaper which are subjected to the challenged use tax.

The First Amendment right at stake here is the right to communicate.[2]

A state may not raise revenue by imposing a charge on the exercise of a constitutional right, even if it does so in a "nondiscriminatory" fashion by imposing the same charge on other activities which do not enjoy constitutional protection. *Murdock v. Pennsylvania*, 319 U.S. 105, 113-115 (1943). The State here concedes that taxes directly tied to circulation levels are forbidden by *Grosjean*, even if they are not "content-related." (*See* State's Brief at 15-31.) Likewise, the early, odious taxes on knowledge were not "content-related"; they restricted the dissemination of speech of supporters and critics of the government alike. *See, e.g.*, F. Siebert, *Freedom of the Press in England 1476-1776* 317 (1952). Thus, the State's argument that the First Amendment is concerned solely with taxes on the "content" of speech finds no support in the prior decisions of this Court and flies in the face of centuries of Anglo-American free speech experience.

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[2] If "revenue is the very lifeblood of any government's operation" (State's Brief at 28), paper and ink are no less vital to newspapers. As a Senate Subcommittee chaired by the Honorable Hubert H. Humphrey concluded in 1951:

> [T]here is no substitute for newsprint in the production of a newspaper. . . . Without newsprint a modern newspaper cannot be published. As Congressman McKinnon testified, "I do not think there is any doubt in anyone's mind that traditional freedom of the press—and, by that, I mean a free opportunity for anyone to engage in the publishing business—is dependent upon an ample supply of newsprint at a reasonable price level."
>
> . . . . The evidence establishes that newsprint shortage and cost have both contributed to newspaper deaths.

Supplies for a Free Press, A Preliminary Report on Newsprint by the Subcommittee on Newsprint of the Select Committee on Small Business, United States Senate, 82nd Congress, 1st Session 2, 6 (1951) (hereinafter "*Supplies*").

B. Minnesota's Use Tax on Paper and Ink Unconstitutionally Impedes the Free Flow of Information.

The State suggests that Star Tribune has invented taxes on paper as the third category of prohibited "taxes on knowledge." (State's Brief at 20-21.) The State's suggestion simply ignores history. The English duty on paper was denounced as a tax on knowledge and eventually was repealed precisely because it impeded the free flow of information.[3] Pre-Revolutionary colonial taxes on paper provoked intense opposition because they interfered with freedom of the press; these paper taxes were short-lived. (*See* ACLU-MCLU-MCAC Brief at 27-30.) American opposition to the various taxes on knowledge continued unabated after independence was achieved.[4]

The absence of any discussion in *Grosjean* of the paper tax as a "tax on knowledge" is hardly surprising. The Louisiana tax there at issue had nothing to do with paper; it taxed advertisements and, effectively, circulation. The attention of this Court, and of the parties, understandably was directed else-

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[3] *See, e.g.*, 2 C. Collet, *History of the Taxes on Knowledge* 134 (1899); 2 T. May, *Constitutional History of England* 215 (1891); F. Siebert, *supra*, at 312, 322; Stewart, *John Lennox and the* Greenock Newsclout: *A Fight Against the Taxes on Knowledge*, 15 Scottish Historical Rev. 322, 322 (1918); *Taxes on Knowledge*, Edinburgh Review, October, 1835, at 126, 126, 130n*.

[4] *See, e.g.*, I. Thomas, *The History of Printing in America* 279 (M. McCorison, ed., 1970, from 2d ed. 1874) ("The legislature of Massachusetts had in March, 1785, passed an 'act, imposing duties on licensed vellum, parchment and paper.' This act laid a duty of two-thirds of a penny on newspapers, and a penny on almanacs, which were to be stamped. The British stamp act of 1765, violently opposed in the colonies, rendered this act so unpopular from its very name, that the legislature was induced to repeal it before it went into operation."); Brief of Appellant at 19-20.

where, although paper taxes were mentioned in the publishers' extended historical discussion in Appendix B, Appellees' Brief at 49-53, 56-58, *Grosjean*.

Finally, the State argues that taxes on paper cannot be unconstitutional because Congress formerly imposed an import duty on paper. This argument is unsound. "Import restrictions . . . rest on different considerations and different rules of constitutional law from domestic regulations." *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 125 (1972). The justification for the import duty on newsprint rested on the need to encourage an important domestic industry.[5] On the other hand, the challenged use tax does not encourage the domestic production of newsprint. As a "revenue-raising measure," and as a burden upon free speech, the challenged use tax is indistinguishable from the early taxes on knowledge which, in England, retarded the establishment of mass-circulation news-

[5] The Revolutionary War cut off imports of paper from England, creating an acute paper famine. *Supplies*, *supra* at 1. In response, 80 to 90 paper mills were established in the United States by the war's end. *Id.* at 8. The first tariff act protected the fledgling paper manufacturing industry, which was recognized as an important national asset. *Id.*; L. Weeks, *A History of Paper Manufacturing in the United States 1690-1916* 102 (1916). By 1810, there were more than 200 American paper mills. *Supplies*, *supra* at 8. Eventually, the production of newsprint shifted to Canada, for unrelated reasons. L. Ellis, *Print Paper Pendulum: Group Pressures and the Price of Newsprint* 5-6 (1948), *reproduced in* L. Ellis, *Newsprint: Producers, Publishers, Political Pressures* (1960). When the import duty actually became a financial hardship for publishers, it was soon lifted. Modifications in import duties were suggested on occasion as ways to encourage the production of newsprint in the United States. *See, e.g.*, *Supplies*, *supra* at 18, items 24 and 26.

papers, and, in America, are prohibited by the First Amendment. (*See* Brief of Appellant at 24.)

The State's argument regarding import duties on paper is today merely academic. Newsprint is specifically exempted from any import tax, 19 U.S.C.A. § 1202 (Tariff Schedule 2, Part 4), and has been so since 1922. Tariff Act of 1922, ch. 356, 42 United States Statutes at Large 931 (1923). No duty has been paid since 1913 on imports of newsprint from Canada, the primary supplier of newsprint to American publishers. *Report of the Federal Trade Commission on the News-Print Paper Industry* 45 (June 13, 1917) (hereinafter "*Report*").

Paper which could be used in the production of newspapers was subject to an import duty prior to 1913. *Id.* The duty was mentioned in the decisions of this Court construing the statutory language of other tariff provisions. *E.g., Pott v. Arthur*, 104 U.S. 735 (1882); *Arthur v. Moller*, 97 U.S. 365 (1878). However, no decision of this Court addresses the constitutionality of the import duty on newsprint, and history suggests that its constitutionality should not be lightly assumed.

Newspaper publishers had little reason to challenge the import duty's constitutionality in the courts prior to its legislative exemption, because they generally had access to ample supplies of cheap domestic newsprint. Ellis, *Print Paper Pendulum, supra* at 15. Little or no newsprint was imported prior to 1897. *Id.* at 14. In 1901, the United States imported less than $1,000 of newsprint, and in 1906, less than $65,000. *Report, supra* at 43.

When the import duty began to create financial difficulties for newspaper publishers, it was attacked as an unwarranted

interference with freedom of the press. In 1908, William Jennings Bryan's presidential platform included a plank asserting:

> Existing duties have given to the manufacturers of paper a shelter behind which they have organized combinations to raise the price of pulp and paper, *thus imposing a tax upon the spread of knowledge.* We demand the immediate repeal of the tariff on pulp, print paper, lumber timber, and logs, and that these articles be placed upon the free list.

Ellis, *Print Paper Pendulum, supra* at 45 (emphasis added). When all significant import duties were removed in 1913, the American Newspaper Publishers Association commented: "The days for a tax upon knowledge are gone." *Id.* at 88-89.

II. A "Balancing of Interests" Standard of Review Is Not Applicable to a Direct Tax on Freedom of the Press.

The State contends that the challenged use tax is to be measured by a "balancing of interests" standard of review rather than the higher "strict scrutiny" standard. (State's Brief at 24-28).[6] This argument must be rejected.

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[6] The State heretofore consistently maintained that, while the Minnesota Supreme Court "expressly adopted and correctly applied the strict scrutiny standard of review for this case," that court "went further than it was required to go," and that the "'any rational basis' test is *the* correct standard for review." (Motion at 16) (emphasis added). This was the State's justification for its counsel's statement to the Minnesota Supreme Court that "it would be difficult to uphold . . . [the challenged use tax] . . . under the strict scrutiny standard of review." (*Id.* at n.7.)

Of course, this Court's opinion in *Grosjean* is quite inconsistent with the State's proposed standard of review. The form of the tax at issue in *Grosjean*, coupled with the historical significance of "taxes on knowledge" in the enactment of the First Amendment, compelled this Court's conclusion of unconstitutionality without an analysis of the statute's discriminatory features. *Grosjean*, 297 U.S. at 244-51. Star Tribune's initial First Amendment challenge is presented on the same analytical plane, which might be termed a *per se* rule of invalidity for direct taxes on knowledge. (*See* Brief of Appellant at 17-25.) At that level of analysis, the tax at issue is read with a focus upon its "effect" and "direct tendency"; if those factors demonstrate an actual or inevitable restraint on the press, the tax is unconstitutional without regard to its discriminatory features. *Grosjean*, 297 U.S. at 244-45.

Should this Court agree with the State's argument that the broad *Grosjean* approach is inappropriate here, however, the question becomes what standard of review is appropriate for determining the First Amendment validity of the patently discriminatory features of the challenged use tax. In support of its proposed "balancing of interests" standard, the State cites decisions of this Court involving First Amendment challenges to regulatory statutes or ordinances, not direct taxes on the press. (State's Brief at 25-27.) While *Grosjean*—a tax case—did not discuss standard of review, this Court's subsequent readings of *Grosjean* do not support applying a standard of review of any lesser magnitude than strict or exacting scrutiny to the discriminatory features of the challenged use tax. *See United States v. O'Brien*, 391 U.S. 367, 377, 384-86 (1968); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (also recognizing the distinction between statutes "im-

posing taxes upon rather than prohibiting particular activity . . . [citing *Grosjean*]").[7]

When any tax measure is challenged, a state invariably will defend on the basis of its interest in raising revenue, just as the State has done here. Given the multiplicity of revenue sources available to states and the singularity of a state's interest in raising revenue, when a state tax interferes with the exercise of First Amendment rights, the state must be required to demonstrate a compelling interest to derive revenue *from* the protected First Amendment activity subject to the tax if First Amendment rights are to be afforded adequate protection. (*See* Knight-Ridder/ANPA Brief at 12-13.)

Simply put, the concerns expressed by this Court in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 602-03 (1953), about the vital role played by the press in American society and the reduced numbers of daily newspapers, are even more justified today than they were almost 30 years ago. To apply a more relaxed "balancing of interests" standard of review to the challenged use tax would critically dilute the First Amendment. When a state tax on protected activity is challenged on the grounds that it is discriminatory or excessively restrictive in its impact upon the press, the "strict scrutiny" standard of review is imperative.

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[7] When a state seeks to regulate conduct through the exercise of its powers other than its taxing power, there are bound to be numerous and varied state interests to be served. In such situations, a "balancing of interests" standard arguably *may* be suitable to accommodate such legitimate state interests which do not unnecessarily impinge upon protected First Amendment activity. Nonetheless, this Court recently has expressed a contrary view. *See Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. at 4073. In contrast, regulation *per se* by the exercise of a state's power to tax is relatively infrequent.

III. The Challenged Use Tax Departs From Broad Sales and Use Tax Principles to the Detriment of a Small Group of Publishers of Large-Circulation Minnesota Newspapers.

A. The Challenged Use Tax Repeatedly Discriminates Against a Few Publishers of Large-Circulation Minnesota Newspapers.

The State repeatedly ignores the actual effect of the challenged use tax, asserting that the broad definition of "publication" encompasses more than just newspapers (State's Brief at 2-3, 10, 33, 39), and that the challenged use tax is part of an overall sales and use tax measure (State's Brief at 2-3, 7, 9-14, 25, 29, 31, 37-38). The evidence of record concerning the actual payment of the tax during the years in question, however, establishes that there were only 11 taxpaying publishers of Minnesota's large-circulation daily newspapers in 1974, and 13 such publishers in 1975. (JA-23-26.) To echo the State's own language, "no evidence whatsoever has been presented to show" (State's Brief at 4) that the challenged use tax was paid by any other newspaper publishers, or by even one publisher of "magazines, advertising supplements, shoppers guides, house organs, trade and professional journals and serially issued comic books" (State's Brief at 10).[8]

The State, which possesses records of all use tax payments and could have produced additional evidence had such existed,

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[8] During oral argument before the Minnesota Supreme Court, the State's counsel asserted that "there are in fact large companies in the State who, for purposes of advertising circulars and so forth, do purchase large amounts of paper and ink and do exceed the one hundred thousand-dollar exemption." (A-32.) There is absolutely no evidentiary support in the record for this assertion.

neither challenged, nor expanded upon, the evidentiary record presented by Star Tribune. By its failure to produce evidence within its control, the State is deemed to concede that any such evidence is unfavorable to the State's position—namely, that Star Tribune's evidence is correct that *only* a few publishers of Minnesota's large-circulation daily newspapers paid the challenged use tax.[9]

The history and language of the challenged use tax further demonstrate that a small group of newspaper publishers has been "singled out for special taxation," in the words of *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1946) (State's Brief at 18). For example:

1. *"Publications" was the* only *previously exempt sales and use tax category adversely affected by the 1971 legislation.* (*See* Brief of Appellant at 4-5.)

2. *The challenged use tax is the* only *section of Minnesota's sales and use tax laws which expressly prohibits taxpayers from claiming the benefit of separate, otherwise applicable exemptions.* The challenged use tax imposes a tax on paper and ink consumed by publications "notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary." (A-84.) There is no similar

[9] In its Brief, the State observes that the "record does not reflect the actual impact of the tax on other 'publications' besides newspapers. . . ." (State's Brief at 4.) Given the State's clear self-interest in meeting Star Tribune's arguments, there can be no doubt whatever that, if the challenged use tax had an actual impact on other "publications," the State would have established that fact by record evidence. *Cf. Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character.")

"notwithstanding any other provisions" clause anywhere in Minnesota's sales and use tax laws. (A-70-90.)

3. *The challenged use tax is the* only *section of Minnesota's sales and use tax laws which creates categories based upon the dollar amounts of prior purchases.* (*See* Brief of Appellant at 25-26, 42-46.)

4. *The challenged use tax is the* only *section of Minnesota's sales and use tax laws which imposes a greater burden on local businesses than on out-of-state merchants doing business in Minnesota.* (*See* Brief of Appellant at 46-47.) The State's response to Star Tribune's argument is that it "simply has no power to impose its use tax on the foreign purchase of paper and ink by reason of the due process clause of the fourteenth amendment." (State's Brief at 41.) This response ignores the fact that the State claims the power to impose a sales tax on all publications sold in Minnesota (State's Brief at 38-40), a taxing alternative which arguably would have equalized the burden between domestic and out-of-state publishers with respect to Minnesota sales.[10] The State's due process dilemma is solely of its own creation, resulting from a unique and unexplained departure from the State's otherwise-universal approach of taxing only final products, and not component parts.

5. *The challenged use tax is the* only *section of Minnesota's sales and use tax laws which imposes a tax upon component parts, rather than upon final products.* (*See* Brief of Appellant at 47-49.)

---

[10] Star Tribune maintains that a tax on the sale of newspapers would be unconstitutional. (*See* Brief of Appellant at 34-41.)

Despite more than 18 pages of discussion (State's Brief at 32-50), the State never explains why *any* of this peculiar discriminatory treatment is *necessary* to accomplish any governmental purpose, much less a compelling one. The State's position essentially is that, where taxes are concerned, it has broad discretion to do as it pleases and it need not justify its classifications, even when those arbitrary classifications raise a strong inference of discriminatory intent. However, when a tax imperils First Amendment rights, the State's discretion is restricted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 & n.3 (1973).

B. The Constitutionality of the Challenged Use Tax Is Determined by its Effect or Consequence, and Not by its Perceived Textual Neutrality or the Absence of Punitive Intent.

The State attempts to combine the perceived textual neutrality of the challenged use tax and the absence of express record evidence that it was the product of punitive legislative intent to demonstrate the constitutionality of the tax and avoid *Grosjean*. (State's Brief at 9-13, 15-20, 30, 42-50.)

The State's argument on textual neutrality is without substance or support. Drafters of tax statutes are fully capable of creating the appearance of equal treatment. But that is not the sole focal point of constitutional analysis. For example, Louisiana's unconstitutional license tax on newspaper advertising at issue in *Grosjean* was no more, and no less, textually neutral or non-discriminatory than is the challenged use tax here at issue. The dominant focus in *Grosjean* was upon the Louisiana statute's *effect* "to curtail the amount of revenue realized from advertising" and its *direct tendency* "to restrict

circulation." (297 U.S. at 244-45.) Artful legislative draftsmanship is no barrier to this Court's analysis of the actual or inevitable effect of the challenged use tax.

The State's reading of *Grosjean* would limit its holding of unconstitutionality to taxes which are the direct product of punitive legislative intent aimed at newspapers. (State's Brief at 17-20.) The State supports its position by citing one passage from *Grosjean* (297 U.S. at 250), and incomplete passages from three subsequent decisions of this Court distinguishing *Grosjean*.[11] The State simply ignores this Court's explanations of *Grosjean* in *United States v. O'Brien*, 391 U.S. at 384-85 and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 461-62, that the effect or consequence of a tax, and not the underlying legislative motive or intent, is the focal point upon which its constitutionality is to be judged when confronted with a freedom of press challenge. *See United States v. O'Brien*, 391 U.S. at 383 (". . . under settled principles the purpose of Congress . . . is not a basis for declaring . . . legislation unconstitutional").

To adopt the State's skewed reading of *Grosjean* would present a dangerous threat to freedom of the press. The effect or consequence of a tax is far more easily and reliably discerned than matters as elusive as legislative motive or intent. (*See* Brief of Appellant at 22-25; ACLU-MCLU-MCAC Brief at 55-60.)

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[11] *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 184 (1946); *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 383 (1973); and *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978).

CONCLUSION

The January 5, 1982, judgment of the Minnesota Supreme Court should be reversed for the reasons set forth in this Reply Brief and in Star Tribune's prior written submissions to this Court. Star Tribune suggests that this Court should base its decision here, as it did in *Grosjean*, on broad freedom of the press grounds. Only such a reaffirmation of *Grosjean*'s principles will serve the two desirable goals of fully protecting the press from unconstitutional taxation of its expressive activity and of affording the states a clear guideline in the future exercise of their taxing power.

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No. 81-1839

Office - Supreme Court, U.S.
FILED
AUG 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

—VS.—

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE MINNESOTA CIVIL LIBERTIES UNION AND THE MINNESOTA COALITION AGAINST CENSORSHIP, *AMICI CURIAE*

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members, dedicated to preserving and protecting the fundamental rights of the people of the United States. The Minnesota Civil Liberties Union (MCLU) is one of its state affiliates, a private, non-profit, membership-only organization having approximately 3,500 members in the State of Minnesota, and has as its purpose the protection of the rights and liberties preserved to the people by the Minnesota and United States Constitutions. Foremost among those liberties is the freedom of speech and the press, and both the ACLU and the MCLU have been active in the defense of these freedoms against laws lim-

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[1] Letters from both parties consenting to the filing of this brief have been lodged with the Clerk of this Court.

iting the flow of information the first amendment was enacted to secure.

The Minnesota Coalition Against Censorship (MCAC) is a private coalition of 24 organizations, including, among others, the American Association of University Women, the Minnesota Civil Liberties Union, the Minnesota Council for the Social Studies, the Minnesota Education Association, the Minnesota Educational Media Organization, the Minnesota Federation of Teachers, the Minnesota Library Association, the National Conference of Christians and Jews (Minnesota Division) and the Newspaper Guild of the Twin Cities. Its purpose is to oppose censorship of books, films, educational material and newspapers in the State of Minnesota. The MCAC was founded in 1978 to communicate censorship incidents to member groups, and to oppose abridgement of

freedom of expression through appropriate actions such as lobbying, public education in censorship matters and legal actions against the censor.

The law at issue here substantially abridges first amendment rights and denies equal protection of the laws by singling out newspapers, and among them two large newspaper companies, for a heavy tax. Because of the severe threat such taxes will pose, if upheld, to our nation's economically fragile and crucial major newspapers, the American Civil Liberties Union, the Minnesota Civil Liberties Union and the Minnesota Coalition Against Censorship submit this brief as amici curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

The appellant's jurisdictional state-

ment in this case was filed at a poignant moment: just after the announcement that the afternoon Star would be merged into the morning Tribune. According to a front-page story in the St. Paul Dispatch, March 24, 1982, "about 35 reporters and editors and 20 newsroom support people are facing layoffs. About 35 positions will be eliminated in the production and distribution departments." Even more significant losers, however, were the Star's 170,000 readers, as Minneapolis followed a sad national trend. The Star joined a casualty roll that already included the Washington Star, the Philadelphia Bulletin, the Chicago Daily News and many others, and continues to lengthen with the demise of the Cleveland Press in June 1982, of the Duluth Herald at the end of July 1982, and of the Des

Moines Tribune this coming fall.[2]

The present case is a constitutional challenge to Minnesota's "big newspaper tax," Minn. Stat. § 297A.14, third paragraph, which exploits the state's two major newspaper companies[3] as a revenue source while having little effect, and in almost all cases no effect at all, on the hundreds of other newspapers in the state. The tax is paid only by publishers, and there is no evidence that it has

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[2]The Minneapolis Star and Tribune Company, like many major publishers, has been under increasing financial pressure for several years. See, e.g., A Washington Post Bid to Buy into Cowles, Business Week, March 8, 1982, at 33; Star and Tribune Co. Annual Earnings Decline by 89%, Editor & Publisher, May 22, 1982, at 89. As further noted on page 16 infra, the tax at issue in this case is a large portion of Appellant's net profit.

[3]Appellant publishes the Minneapolis Star and Tribune, the state's largest newspaper. Knight-Ridder Newspapers, Inc., publishes the next three (previously four) major dailies in St. Paul and Duluth. (Knight-Ridder also found it necessary to merge its two Duluth newspapers at the end of July 1982, but, at least for the time being, still publishes two newspapers in St. Paul.)

ever been paid by anyone except newspaper publishers. In 1974 and 1975, the only years for which data appear in the record, the two companies paid almost 95% of all taxes collected under this law, and only ten others paid anything at all in either year. Minneapolis Star and Tribune Co. v. Commissioner of Revenue, 314 N.W.2d 201, 203-204 (Minn. 1981).

It appears that no other state has a "big newspaper tax" of any sort at present, and the only closely similar statute of which we are aware is the Louisiana tax on newspapers with circulations exceeding 20,000 struck down by this Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).[4] As in this case, the

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[4] Another somewhat similar case is City of Tampa v. Tampa Times, 153 Fla. 709, 15 So.2d 612 (1943), in which the Florida Supreme Court, relying on Grosjean, struck down a city license tax of $40 for newspapers with less than 10,000 circulation, $500 from 10,000 to 30,000 circulation, and $700 for circulation exceeding 30,000. The

Louisiana statute was challenged on both first amendment and equal protection grounds. The Grosjean Court, however, in an opinion signed by Justice Sutherland but reportedly including a substantial contribution by Justice Cardozo,[5] spoke eloquently of the impossibility of such a tax under the first amendment, but found it unnecessary to reach the question of equal protection.[6]

The present case is an action for a refund brought by the Minneapolis Star and Tribune Company, which alone paid 67

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4 continued facts of the present case, however, are much more dramatic: all newspapers paid at least $40 in Tampa, whereas 97% pay nothing in Minnesota, and the difference between the largest and the smallest was only $660 in Tampa, but is over $600,000 in Minnesota.

5 See I. Brant, The Bill of Rights 397-399 (1967).

6 297 U.S. at 251. The district court, however, had found the Louisiana tax unconstitutional on equal protection grounds. American Press Co. v. Grosjean, 10 F. Supp. 161 (E.D. La. 1935).

and 68 percent of all taxes collected under this law in 1974 and 1975. The state District Court held the third paragraph of § 297A.14 unconstitutional under the free press and equal protection provisions of the United States and Minnesota Constitutions, and ordered the refund.

On appeal by the Commissioner of Revenue, the Minnesota Supreme Court reversed, upholding the tax essentially on the ground that it was part of a general, broadly based scheme of sales and use taxes. From this premise, it was held to follow that no equal protection issue arose as between newspapers and others subject to sales or use taxes, and that no first amendment issue arose at all, despite Grosjean, because the tax was on businesses rather than on expression. As to the focus on just two companies and the virtual or complete exemption for the

rest, that court found no equal protection problem, noting that the distinction "may be justified as a legislative policy to give favorable tax treatment to smaller enterprises,"[7] 314 N.W.2d at 209, although the Legislature had not stated this or any other justification. The court asserted that it was applying a "strict standard" of review, 314 N.W.2d at 207, but its version of strict scrutiny consisted of just two sentences:

> The sales and use tax law is a revenue-raising measure. This is perhaps the most compelling goal of a state government.[8]

Id. Nothing in the opinion discusses

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[7]Compare Buckley v. Valeo, 424 U. S. 1, 48 (1976): "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." See also page 52 infra.

[8]Compare Memorial Hospital v. Maricopa County, 415 U.S. 250, 263 (1974): "[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens [cita-

whether, or even states that, the classification is necessary to the statute's articulated compelling interest. On the contrary, the opinion appears to be based on a practically irrebuttable presumption that tax laws are constitutional.

Amici urge that the decision of the Minnesota Supreme Court be reversed, and the tax declared unconstitutional, because:

1) the Minnesota Supreme Court's rulings were based on a grossly distorted interpretation of the facts, which is flatly contradicted by the information given in that court's own opinion;

2) the form, impact and potential

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8 continued

tion omitted], so appellees must do more than show that denying free medical care to new residents saves money. The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State. [Citation omitted.]"

for abuse inherent in the unique type of tax imposed by Minnesota make it substantially identical to the Stamp Taxes and taxes on paper that it was among the first amendment's purposes to forbid; and

3) the Minnesota Supreme Court's novel approach to strict scrutiny, requiring a compelling interest but not that any relationship between the classification and the interest be shown, is contrary to every relevant modern decision of this Court.

ARGUMENT

I. THE "BIG NEWSPAPER TAX" APPLIES ONLY TO A FEW NEWSPAPERS, AND IS NOT AN ORDINARY PART OF A GENERAL SYSTEM OF SALES AND USE TAXES.

On July 6-10 and 13-17, 1970, the Minneapolis Tribune ran a series of ten front-page articles on "Influence and the

Legislature," focusing on conflicts of interest said to affect the actions of 11 named and pictured members of the State Legislature. The 11 included the Chairman and two other members of the Senate Committee on Taxes and Tax Laws, and two members of the House Committee on Taxes.

Possibly by coincidence, the predecessor of today's "big newspaper tax," in the form of a tax on paper and ink used by publishers of periodicals, was adopted by the Minnesota Legislature in 1971. Minn. Laws 1971, Sp. Sess., ch. 31, art. 1, § 5, subd. 1(i). That original law, however, applied to all paper and ink used in producing publications of all sorts, and accordingly aroused opposition from all parts of the state.

Perhaps this opposition would have led to the repeal of the tax in the Legislature's 1973 session. The Legislature

chose not to preserve a legislative history, but it may be inferred that when the suggestion was made that rural, small-town and weekly newspapers (and apparently all publications other than newspapers) be exempted by limiting the tax to annual usage in excess of $100,000, most of the opposition evaporated.[9] A tax on New York City is a

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[9] In its Motion to Dismiss, page 24, the State speculates about Appellant's motives in bringing this suit:

> Were the $100,000 exclusion removed, only a relatively minor tax would be collected from each of numerous small publishers but significantly increased taxes would be collected from large publishers.
>
> Needless to say, this is not the result sought by Star Tribune. Instead, Appellant seeks to have the entire use tax declared unconstitutional, with or without the $100,000 exclusion.

With no more, but certainly no less, basis in the record than the State can provide for this speculation or for its speculation about the Legislature's purposes (see pages 48-60 infra), it is submitted that a requirement that the tax apply to all or to none would have meant its complete, rather than partial, repeal in 1973. If that is

pleasant idea to Upstaters. A tax on Chicago is a pleasant idea to Downstaters. And a tax on "the Cities" is a pleasant idea to Minnesota Outstaters.

As it happened, the tax was repealed only in part: the tax on major newspapers such as the Appellant's was reduced by $4,000 per year, and the tax on their hundreds of smaller competitors was entirely eliminated. In 1974 and 1975, the only years for which data appear in the record:

the two major companies paid a total of	$1,736,902
all others combined paid a total of	99,508

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9 continued the case, and if the political situation has not changed on this point, the economic interests of Star Tribune would be equally served by a ruling that the tax is unconstitutional only because it discriminates between large and small newspapers, for that would result in a repeal of the entire tax. However, that would not be a satisfactory result from the civil liberties perspective, for it would allow taxes like Iowa's (see note 11 infra) to survive.

Perhaps such matters should ordinarily be left to the political processes, subject to the "one person, one vote" principle of Reynolds v. Sims, 377 U.S. 533 (1964). But this is not just a tax on the big cities; it is a tax on the big-city newspapers.

Only newspaper companies pay this tax. Only two newspaper companies pay more than a nuisance amount of tax--enough, for example, to justify the lawyer's fee for the first level of court challenge. 314 N.W.2d at 203-204. The great majority, 97% of Minnesota newspapers, pay nothing at all. Other industrial users of paper and ink, including, for example, tax-exempt producers of food packaging and school books, pay nothing at all. Minn. Stat. § 297A.25.

In two years, the Minneapolis Star and Tribune Company paid more than $1.2

million, and Knight-Ridder Newspapers, Inc., paid $493,000.

It would be too much to claim that the "big newspaper tax" killed the Star, or was intended to. But it would not be an exaggeration to say that its contribution may have been significant. In the fiscal year ended February 28, 1982, the Minneapolis Star and Tribune Company's net operating margin was only about $3.6 million, including its newspapers in other states and its television stations. St. Paul Pioneer Press/Dispatch, March 29, 1982, at 1B, col. 2. The tax, incidentally, was raised to 5% effective June 30, 1981, Minn. Laws 1981, ch. 1, art. IV, § 5, and the price of newsprint has risen sharply in recent years.[10]

The Minnesota Supreme Court, however, characterized this tax as part of

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[10] See pages 21-22 infra.

a general revenue-raising scheme. This Court has carefully distinguished between general business regulations, to which newspapers are subject in the same way as other businesses, and specific impositions on newspapers and expressive activities, which are highly suspect. See, e.g., Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (Fair Labor Standards Act). Recognizing this, the Minnesota Supreme Court offered the theory that the "use tax" on newspapers, which are not subject to a sales tax, puts them in the same position as businesses whose products are subject to the sales tax. In its view, that made both the free press objections and the equal protection objections disappear:

> It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine)

> are subject in Minnesota.[11] Unlike the type of tax found to be unconstitutional in Grosjean, sales and use taxes are now commonplace and readily accepted. [Citations omitted.]

314 N.W.2d at 207.

The claim is not, of course, that "use taxes" on the paper and ink used by newspapers are widely accepted, for they

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[11] A footnote at this point reads, "Iowa imposes a similar tax on newsprint and ink. Iowa Code Ann. § 423.1, subd. 1 (West Supp. 1980)." The Iowa statute is indeed the only other law currently in effect that we have been able to find imposing a tax on paper and ink used by newspapers. It is far from "similar" to Minnesota's "big newspaper tax," however, because it applies to all newspapers, and even to "free newspaper[s] or shoppers guide[s]." Thus the similarity would only be to the 1971 version of the Minnesota statute, supra. Even so, it appears to share the constitutional infirmity of the Minnesota statute in that newspapers are singled out for a tax not imposed on other businesses. No decision on the constitutionality of the Iowa statute has been found.

It may not be insignificant that at least one major Iowa newspaper company, the Des Moines Register and Tribune Company, has recently found itself in serious financial difficulty, St. Paul Dispatch, March 19, 1982, at 11B, col. 2, and will have to merge its two newspapers into one this fall. See Editor & Publisher, June 5, 1982, at 10.

are not; apparently they exist only in Minnesota and Iowa. Rather it is that Minnesota's tax on paper and ink is part of a general system of sales and use taxes, and that systems of sales and use taxes are widely accepted. This is suspiciously close to a claim that any tax, however obvious its unconstitutionality, can be saved by re-labelling it a "use tax."

In fact, the "use tax" on paper and ink resembles other use taxes in name only. Section 297A.14 imposes a use tax on various personal property "unless the [sales] tax imposed by section 297A.02 was paid on said sales price. . . ." Section 297A.24 allows a deduction for the full amount of any tax on "sale, storage, use or other consumption" of the property in any other state, adding:

> If such tax imposed in such other state was equal to or greater than the tax imposed in

> this state, then no tax shall be due from such person under section 297A.14.

Thus the use tax on products other than newspapers is a "compensating" use tax, whose primary effect is to equalize competition between Minnesota retailers and retailers in states with lower sales taxes.

The "use tax" on newspapers, however, has a completely different, and even opposite, effect. Far from imposing a matching burden on out-of-state competitors, it imposes an unmatched burden on a few Minnesota newspapers.[12] Competing newspapers printed in other states, such as the Wall Street Journal, the Christian Science Monitor and the New York Times (all now widely available in Minnesota cities--in fact, home delivery of the

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[12]For 18th century parallels in New York and Massachusetts, see pages 27-29 infra.

Times is now available in some areas) pay no Minnesota taxes, and would pay none however large their Minnesota circulation became. Nor do they pay similar taxes in the states where they are printed. Perhaps most tellingly, they are not subject to the true compensating use tax applied to various other products from out of state. One cannot help observing that the national and out-of-state newspapers rarely criticize Minnesota politicians.

II. THE "BIG NEWSPAPER TAX" IS SIMILAR IN FORM, IMPACT AND POTENTIAL TO THE STAMP TAXES AND TAXES ON PAPER THAT IT WAS AMONG THE FIRST AMENDMENT'S PURPOSES TO FORBID.

Newsprint is not a minor factor in the production of a newspaper. For a newspaper with a circulation comparable to Star Tribune's, it was estimated for

1980 at well over 30% of total publishing costs. Newsprint Information Committee, Newspaper and Newsprint Facts at a Glance (23d ed. 1981). And the cost has been rising. See $525 a Ton Newsprint May Hurt Newspapers, Editor & Publisher, Feb. 20, 1982, at 12. When Juan Perón wanted to shut down La Prensa in Argentina, he did it by taxing newsprint. See G. Blanksten, Perón's Argentina 211 (1953).

A.

Taxation as an instrument for control of the press first appeared in England with the Stamp Act of 1712, 10 Anne cap. 18, which taxed newspapers, advertisements and paper. Like most of its successors, the 1712 tax was defended in part as a revenue-raising measure, but neither publishers nor the citizenry saw that as justification for interfering with the freedom of the press. The his-

tory of these despised taxes and their contribution to unifying the American colonists in rebellion against England is recounted by historians such as F. Siebert, Freedom of the Press in England 1476-1776, 305-322 (1952); C. Collett, History of the Taxes on Knowledge (1899); Z. Chafee, Jr., Free Speech in the United States (1967); and by the Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).

The Stamp Tax of 1765 outraged the colonists. Prime Minister George Grenville had touched "each nerve center in American life at which either economic or intellectual activity was registered." J. Pole, Foundations of American Independence, 1763-1815, 42 (1973). "No group in America was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M.

Jensen, The Founding of a Nation 126 (1968). Benjamin Franklin, who was serving as a colonial agent in London when the Stamp Act was adopted, wrote to America, "I think it will affect the Printers more than anybody . . . as a Sterling Halfpenny Stamp on every Half Sheet of a Newspaper, and Two shillings Sterling on every Advertisement, will go near to knock up one Half of both." Botein, Printers and the American Revolution, in B. Bailyn & J. Hench (eds.), The Press & the American Revolution 11, 23 (1980). Foreign-language publications had to pay twice the normal rates, a severe blow to the German-language Press around Philadelphia, leading Henrich Miller, a German-language publisher, to call the Stamp Act "the most unconstitutional law imaginable." Schlesinger, The Colonial Newspapers and the Stamp Act, 8 N.E.Q. 66, 70

(1935).

Some newspapers set off their columns with heavy black mourning margins the day before the tax went into effect, while others printed silhouetted skulls and crossed bones to symbolize a dead free press. J. Lofton, The Press as Guardian of the First Amendment 2 (1980); Jensen, supra, at 127. The New Hampshire Gazette represented itself as gasping, "I must Die, or submit to that which is worse than Death, be Stamped, and lose my Freedom." Schlesinger, supra, at 74 (emphasis in original). Many publishers defied the law, printing their newspapers on unstamped paper. In New York, Holt's Gazette added to its title the motto, "The United Voice of all His Majesty's free and loyal Subjects in America -- LIBERTY, PROPERTY and no STAMPS." Id. at 75 (emphasis in original).

"The newspapers played a tremendous role in political life from the Stamp Act onward." Jensen, supra, at 127. Newspapers reprinted liberally from each other, thus helping to unite the colonies. They appealed to the masses, stirred their emotions and urged them to action. Id. at 128. When stamped copies of newspapers from Barbados and Nova Scotia were found in Philadelphia, they were publicly burned. Schlesinger, supra, at 79 n. 33. Thus the British themselves helped to make the American press an instrument of revolution. Lofton, supra, at 2; Pole, supra, at 423.

In 1765, an assembly of delegates from nine of the colonies met as the "Stamp Act Congress" to protest the tax. A formal complaint was issued, entitled "A Declaration of Rights and Grievances," the basic principles of which were later

incorporated into the Declaration of Independence. Because of this opposition, the American Stamp Tax was repealed less than a year after its enactment. Chafee, supra, at 321. In 1787, a leading Anti-Federalist, Samuel Bryan, wrote in the Philadelphia Independent Gazette and Freeman's Journal that "[i]t was not the mere amount of the duty on stamps, or tea that America opposed, they were considered as signals of approaching despotism, as precedents whereon the superstructure of arbitrary sway was to be reared." 2 H. Storing (ed.), The Complete Anti-Federalist 176-177 (1981)(emphasis in original).

The English were surprised by the colonists' reaction, but the history of similar taxes in both New York and Massachusetts should have been a sufficient warning. New York had a short-lived tax on paper from 1756 to 1760, which met

with opposition including broadsides from printers about freedom of the press. L. Levy, Judgments: Essays on American Constitutional History 128 (1972). James Parker, printer of the New-York Gazette, called the tax "like to a killing Frost," and complained in particular that New York's stamp tax (like the modern tax in Minnesota) disadvantaged him in competition with printers in nearby colonies. Thompson, Massachusetts and New York Stamp Acts, 26 Wm. & Mary Q. 257 (1969); Botein, supra, at 24.

In Massachusetts another short-lived tax on paper was in effect from January 1755 to May 1757, forcing one Boston newspaper out of business. C. Duniway, The Development of Freedom of the Press in Massachusetts 120 (1906). In 1785, the state imposed a stamp tax on newspapers. This was purely a revenue measure,

but again there was much agitation. The tax was denounced as "the first Stone in the fabrick of Tyranny" in the Massachusetts Centinel. It was also argued that once allowed it might become punitive and so end press freedom, and that it discriminated (in much the manner of the modern tax in Minnesota) against Massachusetts printers, because the presses of the neighboring states could freely send their product into Massachusetts. The tax was repealed a year later, but the lost revenue was replaced by a tax on advertising, which was also resented. Duniway, supra, at 136-37 (emphasis in original).

One editor, Isaiah Thomas, suspended publication of his newspaper, the Massachusetts Gazette. In a letter to the editor of the Massachusetts Spy, he stated, "The tax on News-Paper Advertisements has

a direct tendency not only to restrain, but to destroy, those necessary vehicles of publick information, by taking away their only support. . . ." R. McCoy (ed.), Freedom of the Press 451 (1978). The tax was repealed in 1788. Thomas resumed publication after the two-year tax with greetings of thankfulness that the legislature had restored the constitutional liberty of the press. Duniway, supra, at 137.

Richard Henry Lee of Virginia, who later signed the Declaration of Independence and was president of the Continental Congress, rose to political prominence about the time of the British Stamp Act of 1765. He thought it a threat to the rights of Englishmen, and became a popular hero and leader of the Sons of Liberty in Virginia, in part by expressing that view. E. & H. Morgan, The Stamp

Act Crisis 293-94 (1953); L. Levy (ed.), Freedom of the Press from Zenger to Jefferson 142 (1966). When the Constitution was proposed, he became a leading Anti-Federalist, and in his Letters from the Federal Farmer voiced the concerns arising from the lack of a Bill of Rights, emphasizing the fears his earlier experiences showed to be real threats:

> All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. But, say the advocates, all powers not given are reserved:--true; but the great question is, are not powers given, in the exercise of which this right may be destroyed. . . . By art. 1. sect. 8. congress will have power to lay and collect taxes, duties, imports and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever--taxes on houses, lands, polls, industry, merchandize, &c.--taxes on deeds, bonds, and all written

> instruments--on writs, pleas, and all judicial proceedings, on licences, naval officers papers, &c. on newspapers, advertisements, &c. and to require bonds of the naval officers, clerks, printers, &c. to account for the taxes that may become due on papers that go through their hands. Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it. There may be other powers given, in the exercise of which this freedom may be effected; and certainly it is of too much importance to be left thus liable to be taxed, and constantly to constructions and inferences.

L. Levy (ed.), Freedom of the Press from Zenger to Jefferson 143-44 (1966).

Fear of taxes on newspapers was expressed in other states as well. The New York Anti-Federalist Melancton Smith, in his Address to the People of New York in 1788, agreed with Lee: "We contend, that by the indefinite powers granted to the general government, the liberty of the

press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom." 1 B. Schwartz (ed.), The Bill of Rights: A Documentary History 576 (1971). In New Hampshire, Chief Justice Thomas Cogswell wrote in his 1788 "Essay by a Farmer" that "[t]he liberty of the Press is essential to a free people, it ought therefore to be inviolably preserved and secured in the Bill of Rights, and no duty or tax to be imposed thereon, of what name or nature soever." 4 H. Storing, supra, at 206-207. The Philadelphia Freeman's Journal said on February 20, 1788, "Congress may, under the sanction of that clause which empowers them to lay and collect duties . . . impose so heavy a stamp-duty on newspapers and other periodical publications, as shall effectually prevent all necessary information to the

people through these useful channels of intelligence." 3 H. Storing, supra, at 179 (emphasis in original).

In response, Federalists asserted that a Bill of Rights was unnecessary because the powers of the government were enumerated and did not include any power to tax the press. E.g., 1 B. Schwartz, supra, at 444; The Federalist No. 84 (A. Hamilton). James Iredell, later to be a Justice of this Court, stated:

> The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. . . . If the Congress should exercise any other power over the press than this, they will do it without any warrant from this constitution, and must answer for it as for any other act of tyranny.

1 B. Schwartz, supra, at 454.

In response to arguments of this sort, a pamphlet p[illegible]ted in 1787 in Phil-

adelphia replied:

> It hath been said that the objection with respect to the freedom of the Press is not valid, because the power of controuling that is lodged with the several states.
>
> A little consideration will show that this, though perhaps just in itself, is but a specious pretext. Congress have power to lay all duties of whatever kind, and although they could not perhaps directly bar the freedom of the Press, yet they can do it in the exercise of the powers that are expressly decreed to them. Remember there are such things as stamp duties and that these will as effectually abolish the freedom of the press as any express declaration.

3 H. Storing, supra, at 81-82 (emphasis in original).

Federalists and Anti-Federalists are thus seen to have agreed that Congress ought not to be allowed to tax the press, and perhaps that such taxes would be contrary to natural law. They disagreed only as to whether the point needed to be spelled out as part of a Bill of Rights

or could be relied on as implicit in a system of enumerated powers. In the end, the Federalists got their Constitution, but only on the understanding that a Bill of Rights would be added, including explicit protection for the freedom of the press from stamp taxes and censorship.

B.

Like the Stamp Act of 1712, the Massachusetts acts of 1755 and 1785, the New York act of 1756 and the Stamp Act of 1765, the Minnesota statute is in part a tax on paper. Indeed, it outdoes them by taxing ink also. "[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

In Grosjean, the Court said nothing at all about Huey Long and the political

background of the newspaper tax, although the most damning sort of evidence of invidious intent was available. E.g., Transcript of Record at 43. Under the circumstances, the Court's silence regarding Long's machinations is deafening.[13] As a later Court observed in United States v. O'Brien, 391 U.S. 367, 384-385 (1968), Grosjean stands

> not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in Grosjean the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the

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[13] In its Motion to Dismiss, page 9, the State asserts that "Both Star Tribune and Amicus Minnesota Civil Liberties Union . . . would like to minimize or ignore this important aspect of the Grossjean [sic] case." On the contrary, it is submitted that this Court itself took pains "to minimize or ignore" the Louisiana details, in order to emphasize first amendment principles of much broader application.

> First Amendment, struck down a statute which on its face did nothing other than impose just such a tax.

Even the issue of equal protection, relied on by the district court, American Press Co. v. Grosjean, 10 F. Supp. 161 (E.D. La. 1935), was omitted from this Court's discussion, because the Court preferred to emphasize first amendment principles. 297 U.S. at 251. The Court's opinion, by Justices Sutherland and Cardozo, stood on high ground:

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is

> bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

297 U.S. at 250.

The Minnesota Supreme Court seeks to drain this paragraph of its force by omitting several of its sentences. 314 N.W.2d at 206. But even what remains can be given the interpretation urged by the Minnesota court only if one has not read the remainder of this Court's opinion, for the words "in the light of its history and of its present setting" are the only words in the entire opinion that can

be read as referring in any way to the political situation in Louisiana.

Some other courts, however, sought to narrow the impact of Grosjean by emphasizing the matters this Court had chosen to omit. One justice of the Arizona Supreme Court characterized Grosjean as based on "a situation . . . in the state of Louisiana which was unparalleled in American history." Giragi v. Moore, 49 Ariz. 74, 85, 64 P.2d 819, 823 (Lockwood, J., concurring), appeal dismissed, 301 U.S. 670 (1937). As a distinction, however, this was surely overkill, because the Arizona tax applied to "the sales or gross income of practically every person or concern engaged in selling merchandise or services in the state." 49 Ariz. at 79, 64 P.2d at 821. No tax could more easily be distinguished from the tax only on newspapers with a circulation exceed-

ing 20,000 in Louisiana, or the tax only on newspapers using more than $100,000 worth of paper and ink in Minnesota.

This Court has not sought to confine Grosjean to its "unparalleled" facts. Instead it has treated burdens that single out newspapers as highly suspect, but general regulation and taxation, in which newspapers are treated like all or most other enterprises, as proper. For example, in Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946), a newspaper was held subject to the Fair Labor Standards Act. The Court distinguished Grosjean:

> There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects, it has no special immunity from laws applicable to business in general.[14] [Citation omitted.]

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[14] The Court continued:

> And the exemption of small weeklies and

Id. at 184. Much the same point seems to have been made in Grosjean itself, when the Court observed, "The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented." 297 U.S. at 250.

Although the reading of Grosjean by the concurring justice in Giragi v. Moore, supra, was extremely narrow, the Arizona court's holding with regard to

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14 continued

> semi-weeklies is not a "deliberate and calculated device" to penalize a certain group of newspapers. Grosjean v. American Press Co., supra, p. 250. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. [Citation omitted].

327 U.S. at 184. Plainly there is no evidence of such a benign intent in the present case. Quite the contrary: if it is accepted arguendo that the so-called "use tax" is to compensate for a sales-tax exemption, the smaller Minnesota newspapers are given an advantage not enjoyed by "other small town enterprises," which are subject to sales taxes.

discrimination against newspapers[15] in the latter case was consistent with Grosjean. This seems a sufficient explanation of this Court's dismissal of the appeal; in any event, summary disposition can hardly be considered a ratification of the concurring opinion below. See Washington v. Confederated Banks and Tribes, 439 U.S. 463, 477 n. 20 (1979).

The present decision, in sharp contrast, will, if allowed to stand, open

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[15] If there is a valid objection to Giragi's holding (as distinguished from the excesses of Justice Lockwood's obiter dicta), it would be that sales taxes on newspapers are unconstitutional even if they are imposed on all other businesses as well. See Minn. Atty. Gen. Op. No. 90 (1948). That question is not presented in this case, because the Minnesota tax applies only to newspapers.

Nevertheless, the State appears to argue 1) that sales taxes on newspapers are constitutional, and 2) that any tax somehow related to sales taxes on other products may therefore be imposed on newspapers. Even if the first point is accepted (and this Court has never ruled on the issue), it is obvious that the second does not follow. If it did, the first amendment would place no meaningful limits at all on taxation of the press.

the door to widespread use of a particularly burdensome and offensive tax specifically on newspapers at a moment when the press is particularly vulnerable.

III. THE MINNESOTA SUPREME COURT CORRECTLY STATED THAT STRICT SCRUTINY WAS APPROPRIATE, BUT FAILED TO APPLY THAT STANDARD; ANALYSIS OF THE FACTS SHOWS THAT THE STATUTORY CLASSIFICATION IS NOT NECESSARY TO ANY COMPELLING GOVERNMENTAL INTEREST.

"[R]egulation of First Amendment rights is always subject to exacting judicial scrutiny." Citizens Against Rent Control v. City of Berkeley, 102 S.Ct. 434, 438 (1981).

A.

The Minnesota Supreme Court did not just misinterpret or alter strict scru-

tiny; it did not apply the rule at all.

According to the standard analysis, the Minnesota statute's classification affects the fundamental freedom of speech and the press.[16] Accordingly, strict scrutiny is appropriate:

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[16]The Minnesota tax is vulnerable to several constitutional objections. In choosing which to emphasize, this Court ought to consider, as did the Court in Grosjean, supra, which points have the greatest constitutional significance. In our view, these are freedom of the press and the related issues of equal protection and fundamental freedoms discussed in this portion of the brief. It would appear, however, that a tax graduated in this way unconstitutionally denies equal protection if applied to any sort of business, even without first amendment overtones. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, rehearing denied, 295 U.S. 768 (1935).

As to this, both the Minnesota Supreme Court and the State's Motion to Dismiss offer the startling argument that Stewart Dry Goods is inapplicable because it

> dealt with a totally different kind of tax than the one at issue herein. In Stewart Dry Goods, the tax in question was a "gross sales tax" on the privilege of doing business as a retailer, i.e., it was a tax on total gross receipts without taking into account either expenses or profitability.

> This test means that the justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end. . . . The Court will not accept

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16 continued Motion to Dismiss at 27. This is an elaboration on the Minnesota court's formulation:

> We do not find the reasoning of Stewart Dry Goods and National Tea [Co. v. State, 205 Minn. 443, 286 N.W. 360 (1939), vacated and remanded, 208 Minn. 607, 294 N.W. 230 (1940)] persuasive in the context of this case. Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets.

314 N.W.2d at 209.

But section 297A.14 is, according to its opening words, "For the privilege of using, storing or consuming in Minnesota . . ." (emphasis added), and everyone agrees that the tax is imposed "without taking into account either expenses or profitability." What remains appears to be the assertion that the use tax on big newspapers is "a totally different kind of tax" from the sales tax in Stewart Dry Goods. This is difficult to reconcile with the claim that the sales tax and the "use" tax on big newspapers are really the same thing, which seems to be essential to the remainder of the State's case.

> every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or "overriding" end--one whose value is so great that it justifies the limitation of fundamental constitutional values. Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote that compelling interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.

J. Nowak, R. Rotunda & J. N. Young, Constitutional Law 524 (1978). See Elrod v. Burns, 427 U.S. 347, 362-363 (1976).

The classification established by the third paragraph of Minn. Stat. § 297A.14 is (1) newspapers using over $100,000 worth of paper and ink, and (2) everyone else. The Minnesota Supreme Court asserts that the relevant govern-

mental interest is revenue raising, and that "[t]his is perhaps the most compelling goal of a state government." 314 N.W.2d 201, 207. The court's analysis stops at that point, apparently indicating (1) that the necessity of this classification if this end is to be achieved is so self-evident as to make articulation superfluous, or (2) that a different rule of federal constitutional law applies in Minnesota. The latter would be along the lines of "any statute is permissible if it appears to be related to a compelling goal, such as raising revenue."[17] Stated more concretely, "all taxes raise revenue, and therefore all taxes survive strict scrutiny."

We are unwilling to presume, and we assume that this Court will not presume, that the Minnesota Supreme Court intended

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[17] See note 8 supra.

to defy all of this Court's modern rulings on equal protection. The Minnesota Supreme Court must therefore be understood to have meant that it had determined, through its independent examination of the facts, that the classification is necessary to revenue raising, and that this revenue could not be collected effectively without a classification of at least this general type.

But this too is nonsense. It is obvious that a great deal more revenue would be raised without the exemption of 97% of the state's newspapers and all of the out-of-state newspapers. That is, simple revenue raising may well be "the most compelling goal of a state government," 314 N.W.2d at 207, but it clearly is not the goal of the third paragraph of section 297A.14.

"The state may justify a limitation

on religious liberty by showing that it is essential to accomplish an overriding governmental interest," United States v. Lee, 50 U.S.L.W. 4201, 4203 (1982), and the same sort of showing is permitted with regard to other first amendment freedoms. The Minnesota Legislature, however, chose to provide no legislative history for this statute. Nor did it articulate the classification's purpose in any other way. But

> [t]he interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. [Citations omitted.]

Elrod v. Burns, 427 U.S. 347, 362 (1976).

> Statutes that trench on fundamental liberties, like those affecting significantly the structure of our government, are not entitled to the same presumption of constitutionality we normally accord legislation. [Citation omitted.] The burden of justification is reversed; the burden rests upon government, not on the individual whose liberties are af-

fected, to justify the measure. [Citation omitted.]

Nixon v. Administrator of General Services, 433 U.S. 425, 526-527 (1977) (Burger, C.J., dissenting).

Even where a less exacting standard than strict scrutiny applies, the Court has ignored post hoc rationales in striking down legislation. See, e.g., Mississippi University for Women v. Hogan, 50 U.S.L.W. 5068, 5071-72 (1982); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 653 (1974) (Powell, J., concurring in the result); Griswold v. Connecticut, 381 U.S. 479, 505 (1965) (White, J., concurring).

In minimum rationality cases, this Court has sometimes accepted a "conceivable basis" for a statute whose purpose was not articulated, demanding only that the basis, assuming it to exist, would be legitimate, and that it not be inconsis-

tent with the known facts. See, e.g., Allied Stores v. Bowers, 358 U.S. 522, 530 (1959). But even if minimum rationality were the standard, the "big newspaper tax" could not be justified. The only purpose suggested so far is giving smaller newspapers a competitive advantage over the larger ones, 314 N.W.2d at 209, and the Court has often stated that purpose to be unconstitutional. Buckley v. Valeo, 424 U.S. 1, 48 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens Against Rent Control v. City of Berkeley, 102 S.Ct. 434 (1981).

In searching for a rationale, one is eventually compelled to inquire: if the state wished to tax newspapers as part of a general scheme of sales taxes, why did it not simply impose a sales tax on newspapers? One reason appears to be that in

1948 the Minnesota Attorney General advised the Minneapolis City Attorney that such a tax would be unconstitutional. Minn. Atty. Gen. Op. No. 90 (1948). It would seem to go without saying that if a sales tax on newspapers would be unconstitutional, any tax intended to compensate for the newspapers' sales-tax exemption must be equally unconstitutional.

If, on the other hand, a sales tax on newspapers would not be unconstitutional, the point of the "use tax" must be that it accomplishes something a sales tax could not. The Minnesota Supreme Court refers at one point to "the difficulties and expense of collecting sales tax upon sales of such low-priced items," 314 N.W.2d at 207, but the Minnesota sales tax applies to other products costing as little as ten cents. Minn. Stat. § 297A.03. Since May 1, 1982, it applies

to candy, ice-cream cones, chewing gum and soft drinks. Minn. Laws 1982, ch. 523, art. 34 § 1. The daily Star and Tribune, like the daily Knight-Ridder newspapers in St. Paul and Duluth, currently sells for 25¢.

Even if the real concern behind the Legislature's unwillingness to employ a sales tax had been, say, the difficulties in imposing tax-collection duties on carriers (who collect monthly or bi-monthly anyway, not daily), Minnesota could have adopted an exemption for newspapers delivered by carriers while imposing the tax on newspapers sold by others. See, e.g., W. Va. Code § 11-15-9(12).

"How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" Attributed to Sherlock Holmes by A. C. Doyle, The Sign of

Four (1890) (emphasis in original).

B.

The Commissioner of Revenue and the Minnesota Supreme Court seem ultimately to fall back on the theory that a law adversely affecting the exercise of first amendment freedoms is unconstitutional only if the legislature can be shown to have intended to interfere with those freedoms. This theory is so contrary to everything this Court has ever said on the point, and so dangerous, that it ought to be addressed and rejected expressly.

First, this Court has frequently repeated that invidious intent need not be found to invalidate interferences with first amendment freedoms.

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of

> such rights, even though unintended, may inevitably follow from varied forms of governmental action. . . . Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U.S. 233; Murdock v. Pennsylvania, 319 U.S. 105.

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461 (1958).[18] Similar statements appear in many other cases, including Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 297 (1961); NAACP v. Button, 371 U.S. 415, 438-439 (1963); and Buckley v. Valeo, 424 U.S. 1, 65 (1976).

Second, the State's entire argument on this point rests on the lack of legis-

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[18] As more fully set out on pages 37-38 supra, this Court in United States v. O'Brien, 391 U.S. 367, 384-385 (1968), expressly interpreted Grosjean as standing for the proposition that the effect of burdening freedom of the press was sufficient to make a tax unconstitutional, even without a showing of improper legislative motive.

lative history, a matter controlled by the Legislature itself. The effect of accepting the State's argument would be to license every legislature to ignore the first amendment, provided only that it carefully avoided saying that was its intent.

It is for exactly this reason that the burden of producing direct evidence of specific intent cannot be, and never has been, held to rest on the party claiming the protection of the first amendment.[19] There is no doubt in this case that the burden of Minnesota's tax falls almost exclusively on two newspaper companies. The State would have this Court presume, at least until a smoking gun is produced, that this is purely co-incidental--that the Legislature did not

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[19]Sample cases on this point are quoted on pages 49-51 supra.

intend to discriminate against those two companies. But just as there is no evidence in this (summary judgment) record to show that the Legislature intended the tax as an attack on the big newspapers, there is no evidence in the record to show that this was not the Legislature's intent.

Indeed, the entire record is consistent with, though it does not prove, the thesis that the Legislature was out to get the Minneapolis Star and Tribune Company, or both it and the St. Paul Pioneer Press and Dispatch. If--in some other state--the legislature really were out to get its largest newspapers, and took pains to provide no legislative history, what could those newspapers do to protect themselves?

The State's response, in effect, is 1) How dare you suggest such a thing!

and 2) If we were out to get the Star and Tribune how come it's still in business? Motion to Dismiss, page 11 n. 6. This amounts to the State saying, "Trust us. Your government won't hurt you." But the Bill of Rights, indeed the entire Constitution, exists because we know that government does overstep now and then. The fundamental freedoms enshrined in the first amendment require the full protection of what has come to be called strict scrutiny: clear proof, provided by the government and independently found sufficient by the Court, that the classification is necessary to a compelling state interest.

In the present case, the State has offered no proof at all beyond an asserted presumption of legislative regularity, and no legitimate state interest --compelling or otherwise--has even been

mentioned to which the statutory classification would be necessary. As a result, the third paragraph of § 297A.14 must be held unconstitutional.

CONCLUSION

The tax on paper and ink necessarily reduces publication, if not directly then indirectly by forcing up the prices of advertising and subscriptions. But a tax that applies solely to and tends to discourage a constitutionally protected activity requires a heightened sensitivity to its particular effects. In this case, it is clear that the Minnesota Legislature has gained a weapon that can be used with great precision against particular newspapers.[20] It is the very precision of the "use tax" that makes it such an

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[20]This point may be obscured by the roundness of the figure $100,000, and by the fact that a few other companies paid some tax in the years for

offensive violation of the freedom of the press.

Compared to the enormous burden it places on free expression and particularly on two specific newspaper companies, this tax generates a small portion of Minnesota's overall revenues ($3.6 billion in fiscal 1980). But it provides a constant threat to a few publishers who must now look over their shoulders toward the Legislature, knowing that it is capable of directly penalizing them without

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20 continued which evidence appears in the record. Had the exemption been, say, a round $500,000, only three companies would have paid anything in those years. (The Rochester Post-Bulletin would have paid about $3,300 in 1975, for example, or about 0.4% of all taxes collected under this law for that year, while Star Tribune and Knight-Ridder would have paid 75.5% and 24.1% respectively, not far from the percentages they actually paid.) Had the exemption been $600,000 in 1975, only the four Twin Cities newspapers--not even Knight-Ridder's Duluth papers--would have paid any tax. 314 N.W.2d at 203-204. If the present classification is constitutional, it is difficult to see why the $500,000 and $600,000 classifications would not be.

fear of affecting other business constituents. If the decision is allowed to stand, the same weapon may be available to the legislatures of other states.

The decision of the Minnesota Supreme Court upholding the "big newspaper tax" contradicts fundamental first amendment principles. The American Civil Liberties Union, the Minnesota Civil Liberties Union and the Minnesota Coalition Against Censorship urge this Court to reverse and to declare the third paragraph of Minn. Stat. § 297A.14 unconstitutional.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
AUG 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

On Appeal From The Supreme Court Of Minnesota

BRIEF OF KNIGHT-RIDDER NEWSPAPERS, INC., AND THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS *AMICI CURIAE*

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On Appeal from the Supreme Court of Minnesota

BRIEF OF KNIGHT-RIDDER NEWSPAPERS, INC., AND THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS *AMICI CURIAE*

Knight-Ridder Newspapers, Inc. ("Knight-Ridder"), and the American Newspaper Publishers Association ("ANPA"), respectfully submit this brief as *amici curiae.* The *amici* support appellant Minneapolis Star and Tribune Company ("Minneapolis Star") and urge the Court to reverse the decision of the Supreme Court of Minnesota, 314 N.W.2d 201 (1981).[1]

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[1] Although Knight-Ridder, as an *amicus curiae,* is not covered by Rule 28.1 of the Supreme Court Rules, it has a substantial financial stake in the outcome of this case and considers it appropriate to comply with the spirit of the Rule. Knight-Ridder has no parent corporation. Its only non-wholly-owned subsidiaries and affiliates are

(*footnote continues*)

INTERESTS OF THE AMICI CURIAE

As explained in their separate *amicus* briefs filed in support of appellant's jurisdictional statement, Knight-Ridder and the ANPA have strong, immediate interests in this case.

1. Knight-Ridder is a nationwide communications company engaged in newspaper publishing, television broadcasting, electronic distribution of news, and related enterprises. It publishes more than 35 newspapers and is one of the largest newspaper companies in the United States in terms of total weekly circulation. Newspapers owned by Knight-Ridder have a daily circulation of more than 3.6 million and a Sunday circulation of more than 4.1 million.

Knight-Ridder has a direct financial stake in the outcome of this case. Its wholly owned subsidiary, Northwest Publications, Inc., owns three daily newspapers in Minnesota: the St. Paul Pioneer Press, the St. Paul Dispatch, and the Duluth News-Tribune & Herald.[2] During the years at issue in this litigation, 1974 and 1975, Knight-Ridder's newspapers paid more than $493,000 in use taxes under the Minnesota statute being challenged by appellant Minneapolis Star, Minn. Stat. § 297A.14 (A-5

(*footnote continued*)

Southeast Paper Manufacturing Co.; TKR Cable Company; Bay Cable, Inc.; Fort Wayne Newspapers, Inc.; Fort Wayne Newspapers (a partnership); Long Beach Cablevision, Co.; and the Seattle Times Co.

ANPA is a voluntary association of newspaper publishers and does not have any affiliate corporations, other than members of the association.

[2] Until this month, Knight-Ridder printed two daily newspapers in Duluth, the morning News-Tribune and the afternoon Herald. On August 2, 1982, the two papers were merged into a single morning newspaper, reflecting a nationwide trend toward the closing of afternoon newspapers in major cities.

n.4, A-6 n.5). Those payments represented more than one-fourth of the total taxes collected from all newspapers published in the State. Knight-Ridder currently is paying the Minnesota use tax under protest, filing protective claims for refunds in the event the statute is declared unconstitutional.

2. The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers. Those member papers account for over 90 percent of the nation's daily and Sunday newspaper circulation, and a substantial portion of the nation's weekly newspaper circulation. The newspapers published by appellant Minneapolis Star, as well as twenty-four other newspapers published throughout the State of Minnesota, are members of ANPA. Thus, the Minnesota tax on newsprint and ink at issue in this case has a direct impact on the financial health of ANPA's Minnesota members.

3. The interests of the *amici,* however, like the principles at stake, extend well beyond the sums collected under the Minnesota use tax statute. Both *amici* have a strong interest in deterring the type of discriminatory tax imposed here and in clarifying the standards governing the constitutionality of taxes imposed directly on publications and publishers.

The Minnesota tax provision, in concert with its accompanying exemptions and exclusions, places a substantial financial burden on a select few newspapers. Indeed, just two publishers—appellant Minneapolis Star and *amicus curiae* Knight-Ridder—paid $1,730,000 of the $1,830,000 collected during the two years for which there is evidence in the record, or more than 94 percent of all the taxes collected. Unless the Minnesota statute is held invalid, other States, looking for new sources of revenue,

also may enact legislation that places a discriminatory burden on a few large newspapers. Iowa already imposes a use tax on newsprint and ink, *see* Iowa Code Ann. § 423.1(1) (West Supp. 1981), and Michigan considered such legislation this past spring, *see* Mich. H.B. 5626 (1982).

Of special concern to the *amici* is the impact that the Court's decision in this case will have in clarifying the standard of review that lower courts must apply when they adjudicate challenges to taxes that focus on newspapers. Knight-Ridder, as the owner of newspapers in 16 states, and ANPA, with member papers in all 50 states, have a substantial interest in explaining why taxes directed at newspaper publishing must be subjected to "strict scrutiny" and why such taxes violate the First Amendment unless they are supported by a compelling governmental interest and are narrowly tailored to fit that interest.

STATEMENT

The two basic raw materials used to publish newspapers are newsprint (paper) and ink. Without them, a newspaper does not exist. These are the two assets Minnesota has singled out for its use tax.

Subject to an annual exclusion of $100,000 in purchases—which has the effect of exempting 97 percent of the State's newspapers from the tax—the publisher's tax burden increases proportionately with the volume of publication: the more pages in the paper, or the more copies that are printed, or the more often it is published, the greater the tax imposed on the publisher. By contrast, the tax has nothing to do with the profitability—if any — of the newspaper or with the price charged to the reader. The Minnesota tax is, in short, a levy that varies directly with the quantity of information published.

SUMMARY OF ARGUMENT

The Minnesota use tax on newsprint and ink is directly related to the amount of speech circulated by a newspaper and thus places a special burden on publishers who attempt to provide their readers with frequent editions and larger papers. The trial court found that the use tax is "a limited, special tax . . . which abridges the freedom of the press" (A-65), but the Minnesota Supreme Court reversed on the ground that the State legislature's "broad discretion" over tax matters was sufficient to justify the tax. The *amici* agree that publishing companies are subject to ordinary business regulation. The decision below, however, sustaining the use tax at issue here, applied the wrong standard of scrutiny to this tax on protected First Amendment activity, failed to appreciate the burden that the use tax places on those few large newspaper publishers subject to it, and misinterpreted this Court's teaching in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

I

A. The Minnesota Supreme Court purported to apply a "strict standard" of review in passing on the State's use tax on newsprint and ink, but the court also stated that it was deferring to the "broad discretion" of the State legislature in the area of tax classification. This deference nullified the constitutionally required standard of strict scrutiny. A legislature is entitled to "deference" to its "discretion" only when its tax enactments do not burden specific constitutional interests. When a tax does burden protected activity, no deference is appropriate and the tax can stand only if it is necessary to satisfy a compelling interest and is narrowly tailored to fit that interest.

B. The proferred justifications for imposing the use tax and for its various exemptions are insufficient to satisfy

a "strict standard" of review. The State's "compelling interest" in raising revenue is insufficient to sustain the tax under the facts of this case. If a State's general need for revenues sufficed to justify this type of tax, then taxes could be imposed on any form of First Amendment activity, yet that clearly is not permitted under this Court's precedents. The real issue is whether there is a compelling reason to tax constitutionally protected activity. Moreover, Minnesota's extensive scheme of exemptions from its sales and use taxes undermines any suggestion that a general need for revenue provides a compelling justification for this tax. The purported justifications for the exemptions—administrative convenience and a desire to assist small enterprises—are constitutionally insufficient.

II

A. The Minnesota use tax on newsprint and ink places unique burdens on a few large newspapers. Unlike most use taxes, which are intended to equalize the burden on in-state businesses and their out-of-state competitors, this use tax penalizes in-state newspapers while out-of-state newspapers are not subjected to any tax. The use tax also has the effect of burdening newspapers in a manner not shared by other businesses, and it burdens larger newspapers in a manner not shared by smaller newspapers. The discriminatory distinctions built into the Minnesota use tax strip it of any claim that it is merely a part of a neutral system of business taxation.

B. In *Grosjean v. American Press Co., supra,* this Court struck down an attempt by a State legislature to impose on a few large newspapers an unequal tax that increased in direct proportion to the extent of the newspaper's total "speech." The Minnesota use tax has this same effect: three percent of the State's newspapers pay a special levy on their newsprint and ink, with the result that

the tax increases in direct proportion to the circulation, the number of pages printed, and the frequency of publication. The decision in *Grosjean* is not limited, as the Minnesota Commissioner of Revenue has argued, to taxes that a legislature specifically intends to penalize large newspapers; rather, any tax with the pernicious effect of curtailing the circulation of a select few newspapers is impermissible. Under this Court's decision in *Grosjean*, the Minnesota use tax must fall.

ARGUMENT

I. The Minnesota Supreme Court Applied An Erroneous Standard Of Review.

The First Amendment prohibits Congress from "abridging the freedom . . . of the press." The Framers' strongest motivation in erecting this protection was to ensure that the press would be free from special taxes. *See Grosjean v. American Press Co.*, 297 U.S. 233, 245-48 (1936) (the "predominant influence" on the Framers of the First Amendment was the English experience with the use of taxes as a "mode[ ] of restraint" on newspapers). By virtue of the Fourteenth Amendment, this constitutional guarantee applies against the States. *Id.* at 243; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Sensitive to this firm constitutional policy, the vast majority of States make no attempt to tax the publication or sale of newspapers.[3]

All parties to this litigation have recognized that Minnesota's use tax on newsprint and ink touches important First Amendment interests. The Minnesota Supreme

[3] Appendix A, *infra*, summarizes the tax treatment accorded newspapers by the States. Only six States fail to exempt newspapers, at least to some extent, from their sales taxes, and only three States fail to exempt newspapers from their use taxes.

Court was obliged to acknowledge that a "strict standard . . . must be applied when protected first amendment rights may be infringed" (A-8). While nodding in that direction, however, the court actually applied a much less sensitive standard, referring twice to what it viewed as the "broad discretion as to classification possessed by a legislature in the field of taxation" (A-13; *see also* A-8) The court failed to recognize that when a tax implicates First Amendment interests, normal legislative discretion over economic affairs is entitled to less weight. The reasons proferred for the Minnesota use tax on newspapers do not satisfy the "strict standard" that must be applied.

A. A state legislature is not entitled to exercise "broad discretion" when it enacts a tax with a singular effect on large newspapers.

This Court has had frequent occasion to review the constitutionality of State tax laws, *e.g., ASARCO Inc. v. Idaho State Tax Comm'n,* ___U.S.___, 50 U.S.L.W. 4962 (No. 80-2015, decided June 29, 1982); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981); *Wisconsin v. J.C. Penney Co.,* 311 U.S. 435 (1940), and it is true, as the Minnesota Supreme Court said, that it is ordinarily permissible to defer to a State legislature's decisions regarding tax classifications. *See, e.g., Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 526 (1959); *Madden v. Kentucky,* 309 U.S. 83, 88 (1940). But that deference is proper only when "no specific federal right, apart from equal protection, is imperiled." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973). This Court has made clear that a different calculus applies when the tax places a burden on specific constitutional rights:

> "When a tax measure is challenged as an undue burden on an activity granted special

> constitutional recognition . . . the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion."

Austin v. New Hampshire, 420 U.S. 656, 662 (1975).

The Supreme Court of Minnesota failed to recognize that the First Amendment interests in this case compelled the use of the more stringent degree of inquiry called for by cases like *Austin,* which the court ignored, rather than the deferential standard of *Madden v. Kentucky, supra,* on which it relied. The importance of this difference is dramatically illustrated by comparing *Madden,* which involved a tax on purely commercial activities, with this Court's decision in *Speiser v. Randall,* 357 U.S. 513 (1958), which involved a tax program trenching on First Amendment interests.

In *Madden,* the executor of Madden's estate challenged a Kentucky law that imposed an annual ad valorem tax on bank deposits at a rate of ten cents per hundred dollars for deposits in banks located within the State, and fifty cents per hundred dollars for deposits in banks located outside Kentucky. The executor claimed that this disparate treatment violated the decedent's rights to equal protection and due process. This Court rejected the attack, saying that the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." 309 U.S. at 88. Because the executor's argument essentially was based on the wide disparity in rates—and nothing else—the Court found that he had failed to carry that burden.

In *Speiser,* by contrast, a war veteran challenged a California state law that required taxpayers seeking a property tax exemption for which they were otherwise fully qualified to sign a statement declaring that they did not advocate the unlawful overthrow of the government of

the United States or of a State. The statute thus conditioned liability for the tax on whether and how a citizen exercised his right of free speech protected under the First Amendment. Far from deferring to the California legislature's design of its tax program, the Court insisted that this type of statute be "subjected to close analysis and critical judgment." 357 U.S. at 520.

It did not matter in *Speiser* that only a tax exemption was at stake or that the statute did not prohibit or, by its terms, restrain free speech. The Court reasoned that a "discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." *Id.* at 518. It found the deterrent effect of denying a tax exemption "the same as if the State were to fine them for this speech." *Id.* Therefore, the Court concluded, when "a State's general taxing program" burdens the exercise of First Amendment rights, the Constitution "demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Id.* at 528-29.

Decisions since *Speiser* confirm that the court below erred in according "broad deference" to the Minnesota legislature's actions in constructing the challenged tax. For instance, in *Austin v. New Hampshire, supra,* 420 U.S. 656, this Court gave special scrutiny to a State's commuter tax challenged as a violation of the Privileges and Immunities Clause, which, like the First Amendment, is "granted special constitutional recognition." *Id.* at 662. The Court in *Austin* reviewed earlier Privileges and Immunities Clause decisions and concluded that these prior cases:

> "reflect an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions."

Id. at 663. *See also, e.g., United States v. Lee,* ___U.S. ___, ___, 50 U.S.L.W. 4201, 4203 (No. 80-767, decided February 23, 1982) (holding that federal tax which allegedly impinged on the free exercise of religion could only be justified "by showing that it is essential to accomplish an overriding governmental interest"); *cf. Leary v. United States,* 395 U.S. 6 (1969) (holding federal tax unconstitutional in light of Fifth Amendment privilege against self-incrimination).

As the Court repeatedly has affirmed, "regulation of First Amendment rights is *always* subject to exacting judicial review." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California,* ___U.S. ___, ___; 50 U.S.L.W. 4071, 4072 (No. 80-737, decided December 14, 1981) (emphasis added). Thus, a tax designed by its terms to fall directly on protected activity at the core of the First Amendment—the publication of a newspaper—may stand only if the State demonstrates a compelling justification for it.

B. The reasons proferred for sustaining Minnesota's tax on newsprint and ink are insufficient to satisfy a "strict standard" of review.

It is only the first step, of course, to determine that First Amendment interests are implicated by the Minnesota use tax on newsprint and ink and that a court's usual deference to a State legislature's tax classifications is displaced by a "strict standard" of review. "Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances." *NAACP v. Claiborne Hardware Co.,* ___U.S.___, 50 U.S.L.W. 5122, 5129 (No. 81-202, decided July 2, 1982). The Court recently articulated the governing standard in striking down another Minnesota statute on First Amendment grounds: the State must come

forward with a "compelling governmental interest" for its tax scheme and must demonstrate that its classifications are "closely fitted to further that interest." *Larson v. Valente*, ___U.S.___, ___, 50 U.S.L.W. 4411, 4416 (No. 80-1666, decided April 21, 1982) (striking down Minnesota law exempting some but not all religions from registration and reporting requirements).

Although the Minnesota Supreme Court did not conform its analysis with this formula, the decision below discusses three possible justifications for this use tax and its various exemptions. The sole reason identified for imposing a tax on the publishing of newspapers in the first place is the State's "compelling" need to raise revenues (A-12, 13). With respect to the specific classifications in the statute, the court suggested that the exemptions—which result in the imposition of the use tax on only three percent of the State's newspapers—may be justified by administrative convenience (A-13, 18), or by a desire "to give favorable tax treatment to smaller enterprises" (A-17). Even if one assumes that these suggestions reflect the Minnesota legislature's actual motives, these purported justifications are insufficient to meet the controlling First Amendment standards.

1. Need to raise revenues

No one doubts that the State of Minnesota has a need to raise money for State programs. But reliance on this interest as a basis for the use tax at issue proves both too much and too little.

If a State's general need to raise revenues were sufficiently "compelling," by itself, to justify taxation of constitutionally protected activity, it would be permissible to impose taxes directly on the exercise of the rights to free speech or the free exercise of religion. This Court, however, has not tolerated such efforts. *See, e.g., Speiser*

v. Randall, supra (claim for tax exemption unconstitutionally conditioned on taxpayer's disavowal of protected speech); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943) (city ordinance imposing a flat license tax on canvassers unconstitutional as applied to religious solicitors). The issue, therefore, is not whether a State has a compelling need to raise revenue, but whether the State of Minnesota has shown a compelling interest in imposing a tax *on constitutionally protected activity,* like publishing a newspaper.

Nor is the tax on newspaper publishing merely incidental. The history of this tax shows that the Minnesota legislature has dealt quite deliberately with the taxation of newspapers. When Minnesota first enacted a comprehensive scheme of sales and use taxes in 1967, it manifested sensitivity to the constitutional values at stake and included an exemption from all sales and use taxes for newspapers as well as for newsprint and ink. *See* Minn. Stat. § 297A.25, subd. 1(i) (1967).[4] In 1971, however, the legislature removed the exemption and made the purchase of paper and ink for use in printing newspapers in the State subject to the use tax. Then in 1973, the legislature amended the use-tax section, Minn. Stat. § 297A.14, to provide publishers with an exemption for the first $100,000 in paper and ink purchased and used each year. Minn. Laws 1973, ch. 650, art. XIII, §§ 1-2.

The scheme of exemptions included with Minnesota's use tax on newsprint and ink severely undermines the revenue-producing effects that it might have, and, concomitantly, weakens any argument by the State that it has a compelling need to raise revenue by taxing a select few

[4] The exemption applied to all "publications," a term defined to include newspapers and other printed periodicals published at least once every three months. *See* 13 Minn. Code of Agency Rules, Tax S&U 409, *reprinted in* Appellee's Motion to Dismiss at A-1.

newspapers. Because all of the State's newspapers receive an exemption for the first $100,000 in purchases of newsprint and ink, 97 percent of Minnesota's newspapers pay no tax at all. Moreover, no attempt is made to reach the production or sale of out-of-state newspapers, through either a use tax or a sales tax. In addition, numerous companies that use the same materials, such as those that produce textbooks, are exempt from the use tax, even though their publications also are exempt from a sales tax.

This Court has recognized that deviations from the uniform pursuit of an asserted government purpose can raise serious doubts as to the deference that should be accorded to that purpose or to the State's mode of pursuing it. *See, e.g., Metromedia, Inc. v. San Diego,* 453 U.S. 490, 520 (1981) ("exceptions to the general prohibition are of great significance in assessing the strength of the city's interest"); *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 73 n.14 (1981) ("The Borough's decision to permit live entertainment as a nonconforming use only undermines the Borough's contention that live entertainment poses inherent problems that justify its exclusion."); *see also Taxation With Representation of Washington v. Regan,* 676 F.2d 715, 738 & n.43 (D.C. Cir.) (*en banc*), *pet. for cert. pending,* No. 81-2338 (filed June 22, 1982) (government interest asserted to justify restrictions on lobbying by charitable organizations undermined by special exception for veterans' groups).

In view of these numerous exemptions, Minnesota's general need to raise revenues is not, standing alone, sufficient to sustain a tax that consciously places a substantial burden on the First Amendment activities of a select few newspapers. In this case, the Court has no occasion to consider the permissibility of taxes on constitutionally protected activities when those activities are merely included within the coverage of a facially uniform, neutral

tax, such as an income tax or a general sales tax on all products. What is at issue here is Minnesota's decision to focus its taxing powers on the raw materials of newspaper publishing and to create special, selective exemptions. The State has failed to come forward with a compelling justification for taxing newsprint and ink only when those materials are in the hands of a select few publishing companies.

2. Administrative convenience

The Minnesota Supreme Court suggested that "administrative convenience" might justify limiting the use tax to a few large newspapers. The court used this concept in two contexts: first, in explaining why the legislature may have decided to impose a use tax, borne by the publisher, rather than a sales tax, borne by the purchaser (A-13), and second, in speculating why the legislature granted an exemption that frees publishers of 97 percent of the State's newspapers from paying any use tax at all (A-17 & 18). But this surmise regarding administrative convenience fails as a justification for imposing a use tax on a few large newspapers.

First, these assertions are deficient as a matter of law, for " '[s]omething more is required than bald assertion'—by the state court or by counsel here—to establish the validity of a taxing statute that on its face discriminates." *Austin v. New Hampshire, supra,* 420 U.S. at 666 n.10 (*quoting Mullaney v. Anderson,* 342 U.S. 415, 418 (1952)). It is doubtful, of course, that such "bald assertions" can be supported with proof, but, in any event, the Minnesota Commissioner of Revenue supplied no proof that "administrative convenience" was the basis for adopting, implementing, or retaining the classifications used by the legislature.

Second, claims of administrative convenience are a dubious justification for imposing burdens on the exercise

of constitutional rights. *See, e.g., Carey v. Population Services International,* 431 U.S. 678, 691 (1977); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 263-64 (1974); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972). An argument based on administrative convenience must be rejected when it does not explain how statutory classifications are "closely fitted to further that interest." *Larson v. Valente, supra,* ___U.S. at___, 50 U.S.L.W. at 4416; *cf. Halliburton Oil Well Co. v. Reily,* 373 U.S. 64, 74 nn.8 & 9 (1963). Indeed, the Minnesota Supreme Court itself has held assertions of administrative convenience to be insufficient to justify a taxing scheme that failed to account for all the necessary considerations. *See Independent School District No. 99 v. Commissioner of Taxation,* 297 Minn. 378, 386, 211 N.W.2d 886, 891 (1973).

In this instance, the interests in administrative convenience that might be served by imposing a use tax rather than a sales tax do not explain the exemption for the first $100,000 of newsprint and ink. Nor do these interests explain Minnesota's failure to extend the tax on newsprint and ink to other industrial users of these products—such as printers of food packaging and school textbooks—whose products also are exempt from a sales tax upon purchase by the ultimate consumer. *See* Minn. Stat. § 297A.25, subd. 1(a), (v). Nor does administrative convenience adequately explain why a tax is placed on in-state newspapers but not on the circulation of out-of-state newspapers.[5] Minnesota's sole response on this issue is

[5] If Minnesota, consistently with the First Amendment, may impose a use tax on newspapers within the State, the Due Process Clause would permit it to impose a comparable use tax on some out-of-state newspapers sold in the State. *See, e.g., National Geographic Society v. California Board of Equalization,* 430 U.S. 551 (1977) (sustaining California's imposition of a use tax on an out-of-state business that had a nexus with California through unrelated business activities).

(*footnote continues*)

that the State has "inherently broad powers to create classifications and grant exemptions for the purpose of 'fitting tax programs to local needs,' " Appellee's Motion to Dismiss at 22 (*quoting Madden v. Kentucky, supra,* 309 U.S. at 88). But, when the "fit" weighs unevenly on First Amendment interests, the State does *not* have "inherently broad powers."

3. Assisting small enterprises

The Minnesota Commissioner of Revenue also suggested below, and the State Supreme Court apparently agreed, that this use tax scheme might be sustained, despite its crazy quilt of exemptions, as part of "a legislative policy to give favorable tax treatment to smaller enterprises" (A-17). This Court, however, has flatly rejected the sufficiency of a similar justification for a regulation that imposes a differential impact on parties engaged in First Amendment activities. The argument has no more validity in this case.

A decision to grant "favorable treatment" to smaller newspapers necessarily constitutes a decision by the State to give "unfavorable treatment" to larger newspapers. Yet in *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court said "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49. This conclusion was reaffirmed just this past Term in *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California, supra,* ___U.S.___, 50 U.S.L.W. 4071. In that case, the Court quoted this same passage from

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(*footnote continued*)

The First Amendment issue was not present in *National Geographic,* because California, unlike Minnesota, expressly exempted "periodicals" from all sales and use taxes. 430 U.S. at 553 n.1.

Buckley and then proceeded to strike down a city ordinance which had been defended, in part, as a measure that would further the supposed governmental interest of ensuring that wealthy groups did not have a louder or more influential voice in the initiative process than those less affluent. 50 U.S.L.W. at 4072-74.

The Minnesota Supreme Court attempted to distinguish *Buckley* by denying that "the effect of section 297A.14 is to enhance the voice of one newspaper relative to another newspaper" (A-18). The fact is, however, that 97 percent of Minnesota's newspapers are exempted from paying any tax on newsprint and ink—thereby substantially reducing their costs for these materials—while three percent of the State's newspapers, those with larger circulations, do pay the tax. Under the Minnesota scheme, the availability of the exemption depends solely on the quantum of publishing, as measured by the volume of paper and ink used. Yet, it "cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." *Speiser v. Randall, supra,* 357 U.S. at 518.

The principle underlying *Buckley* and *Citizens Against Rent Control* is plain. When the exercise of free speech is involved, it is not the government's prerogative to favor one segment of our society over another. Thus, a State does not have a legitimate interest, much less a "compelling" one, in extending favorable tax treatment to smaller newspapers by placing the entire tax burden on newspapers with larger circulations. As the Court recently put it in *Larson v. Valente, supra,* in striking down another discriminatory Minnesota statute on First Amendment grounds, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would

impose upon a minority must be imposed generally." ___ U.S. at ___, 50 U.S.L.W. at 4416 (*quoting* Justice Jackson's concurring opinion in *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949)).

Accordingly, any State policy of favoring one group of newspapers in preference to another group can hardly be viewed as a compelling justification for the Minnesota statute. If that is the policy that animates the challenged classification, it is a blatantly impermissible form of discrimination.

* * *

When, as in this case, a statute impinges upon constitutionally protected activity, there is "a special obligation on this Court to examine critically the basis on which liability was imposed." *NAACP v. Claiborne Hardware Co., supra,* ___U.S. at ___, 50 U.S.L.W. at 5130. When measured against the constitutionally required standard of strict scrutiny, the three justifications for this statute cited by the Minnesota Supreme Court are insufficient to support the burden imposed. Consequently, the statute must fall.

II. Even If Newspapers May Be Subjected To Sales Or Use Taxes Under Limited Circumstances, The Discriminatory Use Tax Imposed Here Cannot Be Justified As Merely "Part Of A General System Of Taxation."

The appellant Minneapolis Star has argued in this case, as one ground for holding the statute invalid, that neither a general sales tax nor a general use tax may constitutionally be imposed on newspapers. The Court need not address this broad question, however, just as the Minnesota Supreme Court found that it did not have to

resolve it (A-13 n.10).[6] As shown in Appendix A, *infra*, only a few States endeavor to apply sales or use taxes to newspapers, and there is no clear pattern running through the structure of the tax systems of the States that do impose some form of tax on newspapers. Thus, it would be unwarranted to generalize about the validity of each State's approach.

The case now before the Court involves a specially crafted use tax which does not mirror a general sales tax and which contains unique, discriminatory elements. Neither of the other two States that impose a use tax on newsprint distinguishes among classes of publishers. When addressed in its own context, the Minnesota tax fails the relevant constitutional tests.

A. This use tax impermissibly imposes unique burdens on certain newspapers.

The court below asserted that the use tax on publishers of large-circulation newspapers is simply "part of a general system of sales and use taxation" (A-13). Knight-Ridder and ANPA agree that a legislature may impose on newspaper publishing companies a fair share of "ordinary forms" of general business taxes, such as nondiscriminatory taxes on net income. But easy phrases do not answer the hard question whether a specific tax—such as the use tax at issue here—is indeed "an ordinary form of taxation."

This Court's prior use-tax decisions establish that a more careful scrutiny than that provided by the court below is required in order to determine the validity of a particular tax. "A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, [and] are assessments upon different transactions. . . ." *McLeod v. J. E. Dilworth Co.*, 322

[6] If the Court were to reach this issue, *amici* would concur with appellant that a "tax on knowledge" in the form of a sales tax on newspapers is unconstitutional.

U.S. 327, 330 (1944). Thus, sales taxes and use taxes "may have to justify themselves on different constitutional grounds." *Id.*

When sales and use taxes have differential impacts on interstate commerce, the Court has said that

> " '[i]n each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' . . ."
>
> * * *
>
> "The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax. . . ."

Halliburton Oil Well Co. v. Reily, supra, 373 U.S. at 69-70 (*quoting Best & Co. v. Maxwell,* 311 U.S. 454, 455-56 (1940)). Newspapers engaged in constitutionally protected speech within the State of Minnesota are entitled to no less equal treatment. They do not receive it under the Minnesota statute.

The use tax imposed on large Minnesota newspapers is quite different from the use taxes typically enacted by States and previously reviewed by this Court. In most instances, a use tax is merely "a corollary" to a sales tax system and is imposed "on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax." *National Geographic Society v. California Board of Equalization, supra,* 430 U.S. at 555. Here, however, the use tax is imposed only on large *in-state* publishers and has the effect, not of establishing parity, but of destroying it.

First, out-of-state competitors of Minnesota newspapers are not subjected to any tax, yet out-of-state competitors of other businesses in the State face tax burdens equivalent to those of their Minnesota counterparts. In essence, the equal-treatment purpose typically served by a use tax is turned on its head here, with the result that in-state publishers are penalized. Although discrimination against a State's own residents may be permissible in situations in which there are no special constitutional interests, *cf. Allied Stores of Ohio v. Bowers, supra,* 358 U.S. 522, 533-34 (1959) (Brennan, J., concurring), that result is certainly suspect when it affects the exercise of First Amendment rights. At the least, the tax imposed on a small class of Minnesota newspapers cannot be viewed as merely a neutral part of a traditional, balanced tax program.

Second, the unavoidable effect of the Minnesota use tax is to penalize efforts by a newspaper to expand its product and give readers additional pages of information for the same sales price. Those efforts would increase a newspaper's tax burden under the use tax, yet other Minnesota businesses can engage in comparable activity —providing more product, for instance, at no extra charge—without incurring any additional tax liability. With a product whose size is as variable as a newspaper, even at a constant newsstand price, this surcharge by the State penalizes publishers who want to increase the flow of information to their readers. This tax system thus has a direct and adverse effect on a newspaper's First Amendment right to engage in "the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court for the County of Norfolk,* ___U.S.___, ___, 50 U.S.L.W. 4759, 4761 (No. 81-611, decided June 23, 1982).

Third, the statute's unique $100,000 exemption disadvantages larger newspapers vis-a-vis their smaller competitors. The effective rate of tax increases as a newspaper

purchases newsprint and ink beyond its $100,000 exemption, because the exempted amount becomes an increasingly small percentage of the newspaper's total purchases. Thus, the tax violates the principles set forth in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935), in which the Court held invalid on equal protection grounds a gross-sales tax that imposed higher tax rates on higher volumes of sales. Moreover, the statute "in its practical operation work[s] discrimination" that is impermissible "for a valid use tax." *Halliburton Oil Well Co. v. Reily*, *supra*, 373 U.S. at 69, 70. With any neutral tax, there is no similar discrimination against larger businesses.

B. A tax on newspapers need not reach the limits of *Grosjean* in order to be unconstitutional.

The Commissioner of Revenue and, to a lesser extent, the Minnesota Supreme Court, have suggested that the State's use tax on newsprint and ink should not be struck down because the tax does not evince the hostile qualities of the gross receipts tax at issue in *Grosjean v. American Press Co.*, *supra*, 297 U.S. 233. The court below sought to distinguish *Grosjean* by saying that sales and use taxes "are now commonplace and readily accepted" and for this reason differ from the gross receipts tax in *Grosjean* (A-12). Moreover, the court concluded that the Minnesota use tax statute was not enacted as a "deliberate and calculated device" to restrict circulation and is not "literally dependent upon circulation" (A-15).

The premise underlying that discussion is mistaken, however, because it assumes that a tax on newspapers is valid if it differs from the tax in *Grosjean*. As we discussed above, the Minnesota use tax does not satisfy traditional standards for testing taxes imposed on constitutionally protected activities. In addition, the reasoning of the court below trivializes *Grosjean*, transforms an aberrant extreme into a legal standard, and exalts minor factual differences

into distinctions of constitutional magnitude. Correctly understood, *Grosjean* reflects the Constitution's antipathy to taxes on newspapers.

Although *Grosjean* involved a gross receipts tax and this case involves a use tax, that difference is of no moment. Gross receipts taxes are common; the invalidity of such a tax in *Grosjean* did not rest on anything special about that type of tax. Rather, it was the application of the tax to the circulation of a few large newspapers that placed it at odds with the First Amendment. The tax fell only on publishers whose activities pushed their circulation above a certain level, and the Court held that this "direct tendency to restrict circulation" ran afoul of the First Amendment. 297 U.S. at 245-46.

The relationship between the Minnesota use tax and circulation is at least as direct as in *Grosjean*. If anything, a comparison makes the Minnesota tax more objectionable. In *Grosjean*, Louisiana's 13 largest newspapers were subjected to the special tax, while at least 124 other newspapers in the State paid no tax at all. The disparity here is at least as dramatic: 11 publishers in 1974 and 13 publishers in 1975 had to pay the Minnesota use tax, while nearly 400 other publishers were completely exempt from any tax at all. The gross receipts tax in *Grosjean* varied with the revenues received from advertising. By contrast, because the quantity of newsprint and ink consumed by a Minnesota publisher is directly related to the amount of information circulated by the publisher—as determined by the number of copies printed, the size of each newspaper, and the frequency of publication—the amount of the Minnesota tax, for those papers subject to it, is determined solely by the quantum of information a publisher is willing to disseminate.

Finally, it is true, as the court below emphasized, that this Court referred to the tax in *Grosjean* as a "deliberate

and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled. . . ." *Id.* at 250. Two points must be made, however, about that comment. First, that conclusion did not rest on an evaluation of the subjective motives of the legislature, but involved an inference that a tax that was specially crafted to be "measured alone by the extent of the circulation of the publication" necessarily manifested "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." *Id.* at 251. Because the Minnesota tax has essentially the same effect, the Minnesota legislature may be presumed to have intended the natural and predictable consequences of its statutory scheme, regardless of its actual, subjective motives.

Second, evidence of bad intent has never been a necessary condition for declaring a statute unconstitutional under the First Amendment. Although *Grosjean* is a reminder that government retaliation through discriminatory taxation is totally alien to the Free Press guarantee, overt retaliation is seldom demonstrable. The Court, therefore, has realistically and frequently focused on effect, not intent. For example, in *Buckley v. Valeo, supra,* the Court explained that the First Amendment may be violated "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly *as an unintended but inevitable result* of the government's conduct . . ." 424 U.S. at 65 (emphasis added). Similarly, in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461 (1958), the Court stated:

> "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended,* may

> inevitably follow from varied forms of governmental action. . . . Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived *to have the consequence* of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment." (Emphasis added.)

The decision in *Grosjean* was cited as support for this proposition.

Thus, the lesson of *Grosjean* transcends the specific facts of that case. What was wrong in *Grosjean*—and what is wrong in this case—is that an unequal tax has been placed on a few large newspapers, increasing in direct proportion to the extent of each newspaper's total "speech," with the inevitable tendency of curtailing that speech. It bears repeating that the sums collected under the Minnesota use tax are substantial: more than $1.2 million from the appellant Minneapolis Star during the two years at issue in this case, and more than $493,000 during that time from *amicus curiae* Knight-Ridder. These sums are completely unrelated to any income tax on the publisher's profit, if any, from publishing the papers. Thus, the use tax is simply the functional equivalent of a privilege tax for the privilege of printing a widely circulated newspaper—precisely what the Court found in *Grosjean* the Framers had intended to prohibit. *See* 297 U.S. at 245-48.

The Minnesota use tax can be sustained only if the Commissioner of Revenue satisfies his burden of proving that the tax furthers a substantial governmental interest unrelated to the curtailment of free expression and that the tax burden is narrowly tailored to serve that interest. The Commissioner of Revenue not only has not met that burden, but he cannot meet it. Accordingly, the use tax on newsprint and ink imposed by section 297A.14 of the Minnesota Statutes must be declared unconstitutional.

CONCLUSION

The decision of the Supreme Court of Minnesota should be reversed.

Respectfully submitted.

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August 1982.

APPENDIX

State tax codes vary widely and it is not possible to categorize the various taxes and exemptions with complete precision. In addition, revenue rulings and court decisions may affect the interpretation of the statutory language. A survey of State tax codes, however, indicates that forty-four States and the District of Columbia either exempt newspapers, at least in certain circumstances, from sales taxes or else do not impose a sales tax on any items; only six States make newspapers fully subject to sales taxes. Forty-seven States and the District of Columbia exempt newsprint from any use or consumption tax; only three States (including Minnesota) impose a use tax on newsprint.

Most of the sales tax exemptions for newspapers are set forth expressly in the various State codes. The exemptions for newsprint are sometimes provided expressly and sometimes provided as part of a general exemption for goods used or consumed in the manufacture of other goods that will be sold at retail.

STATE	SALES TAX ON NEWSPAPERS	USE TAX ON NEWSPRINT (a)
Alabama	Taxed	Exempt
Alaska	None	None
Arizona	Partially Exempt(b) (§ 42-1310.2(g))	Exempt
Arkansas	Express Exemption (§ 84-1904(f))	Exempt
California	Express Exemption (§ 6363)	Express Exemption (§ 6362)
Colorado	Express Exemption (§ 39-26-102(21))	Express Exemption (§§ 39-26-102(21); 39-26-203(i))

STATE	SALES TAX ON NEWSPAPERS	USE TAX ON NEWSPRINT (a)
Connecticut	Express Exemption (§ 12-412(f))	Exempt
Delaware	None	None
District of Columbia	Express Exemption (§ 47-2005(6))	Exempt
Florida	Express Exemption (§ 212.08(6))	Exempt
Georgia	Taxed	Exempt
Hawaii	Taxed (c) (§ 237-13(1)(A))	Taxed (c) (§ 238-2)
Idaho	Taxed	Express Exemption (§ 63-3622(x))
Illinois	Exempt (d)	Express Exemption (ch. 120 §§ 439.2, 439.32, 440)
Indiana	Express Exemption (§ 6-2.5-5-17)	Exempt
Iowa	Express Exemption (§ 422.45.9)	Taxed (§§ 422.42.3; 423.1.1)
Kansas	Taxed	Exempt
Kentucky	Taxed	Exempt (e)
Louisiana	Express Exemption (§ 47.305(4))	Exempt (f)
Maine	Express Exemption (§ 36-1760(14))	Exempt
Maryland	Express Exemption (§ 81-326(N))	Express Exemption (§ 81-326(N))
Massachusetts	Express Exemption (64H, § 6 (m))	Express Exemption (64H, § 6 (r))
Michigan	Express Exemption (§ 7.525(h))	Express Exemption (§ 7.555(4)(O))
Minnesota	Express Exemption (§ 297A.25(i))	Taxed (§ 297A.14)

STATE	SALES TAX ON NEWSPAPERS	USE TAX ON NEWSPRINT (a)
Mississippi	Express Exemption (§ 27-65-111(b))	Exempt
Missouri	Express Exemption (12 Mo. Admin. Code § 10-3.340)	Express Exemption (§ 144.030(8))
Montana	None	None
Nebraska	Express Exemption (§ 77-2704(d))	Exempt
Nevada	Express Exemption (§ 372.315)	Express Exemption (§ 372.315)
New Hampshire	None	None
New Jersey	Express Exemption (§ 54:32B-8.5)	Express Exemption (§ 54:32B-8.29)
New Mexico	Express Exemption (§ 7-9-64)	Exempt
New York	Express Exemption (Art. 28, § 1115(a)(5))	Express Exemption (Art. 28, § 1115 (a)(5))
North Carolina	Partially Exempt (g) (§ 105-164.13(28))	Exempt
North Dakota	Express Exemption (§ 57-39.2-01.2)	Express Exemption (§§ 57-39.2-04.16; 57-40.2-04.6)
Ohio	Express Exemption (§ 5739.02(B)(4))	Exempt
Oklahoma	Partially Exempt (h) (§ 68-1357(c))	Exempt
Oregon	None	None
Pennsylvania	Express Exemption (T72, § 7204(30))	Exempt
Rhode Island	Express Exemption (§ 44-18-30(B))	Exempt
South Carolina	Express Exemption (§ 12-35-550(7))	Express Exemption (§ 12-35-550(7))
South Dakota	Express Exemption (§ 10-45-12.1)	Express Exemption (§ 10-46-9)

STATE	SALES TAX ON NEWSPAPERS	USE TAX ON NEWSPRINT (a)
Tennessee	Express Exemption (§ 67-3012(c))	Exempt
Texas	Express Exemption (Tax § 151.319(a))	Express Exemption (Tax § 151.319(d))
Utah	Express Exemption (§ 59-15-4(b)(1))	Exempt
Vermont	Express Exemption (T-32, § 9741(15))	Express Exemption (T32, § 9741(15))
Virginia	Partially Exempt (i) (§ 58-441.6(k))	Exempt
Washington	Express Exemption (§ 82.08.0253)	Exempt
West Virginia	Partially Exempt (j) (§ 11-15-9(12))	Exempt
Wisconsin	Express Exemption (§ 77.54(15))	Exempt
Wyoming	Express Exemption (§ 39-6-405(a)(xxi))	Exempt

(a) Table does not include state property taxes that may be imposed on publishers' inventories of newsprint.

(b) Ariz. Rev. Stat. Ann. § 42-1310.2(g) (1980 & Supp. 1982) excludes from sales tax all revenue "retained by or credited to carriers and other vendors."

(c) The Hawaii sales tax, *see* Hawaii Rev. Stat. § 237-13(1)(A) (Supp. 1981), imposes a tax on all manufacturers equal to one-half of one percent of the value of the article produced "as shown by the gross proceeds derived from the sale thereof."

The Hawaii use tax, *see* Hawaii Rev. Stat. § 238-2 (1976), imposes on all manufacturers who import or purchase goods for use in manufacturing a tax of one-half of one percent of the purchase price. There is no specific reference in the statute to newsprint.

(d) Although the language of the Illinois statutes, *see* Ill. Rev. Stat. ch. 120, §§ 439.2, 439.32, 440 (Smith-Hurd 1974 and Supp. 1981 & Feb. 1982) does not refer specifically to the sale of newspapers, the courts apparently have interpreted the statute to exclude sales of newspapers. *See Time, Inc. v. Hulman*, 31 Ill.2d 344, 201 N.E.2d 374 (1964).

(e) Kentucky subjects newsprint to a property tax. *See* Ky. Rev. Stat. § 132.200 (1982).

(f) Inventories of newsprint are subject to the Louisiana property tax, which is placed on virtually all property within the state.

(g) Sales by carriers and street vendors are exempt from the sales tax by N.C. Gen. Stat. § 105-164.13(28) (1979 & Supp. 1982).

(h) Carrier sales and sales for less than 75 cents are exempt. Okla. Stat. titl. 69, § 1357(c) (West. 1966 and Supp. 1981 & March 1982).

(i) Only sales at newstands are taxed. *See* Va. Code § 58-441.6(k) (1974 & Supp. 1981).

(j) Newspapers delivered by route carriers are exempt from the sales tax under W. Va. Code § 11-15-9(12) (1974 & Supp. 1981).

NO. 81-1839-ASX	TITLE Minneapolis Star and Tribune Company, Appellant v. Minnesota Commissioner of Revenue

DOCKETED	COURT
Apr. 2, 1982	Supreme Court of Minnesota

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: Lawrence C. Brown
	Counsel for Appellee:Paul R. Kempainen
Apr. 2, 1982	Statement as to jurisdiction filed. (Record filed).
Apr. 2, 1982	Appendix filed.
Apr. 9, 1982	Brief, amicus curiae, of The Minnesota Civil Liberties Union in support of jurisdictional statement filed.
Apr. 26, 1982	Brief, amicus curiae, of The American Newspaper Publishers Association in support of Jurisdictional Statement filed.
Apr. 26, 1982	Order extending time to file a response to the jurisdictional statement until June 1, 1982.
Apr. 30, 1982	Brief, amicus curiae, of Knight-Ridder Newspaper, Inc., in support of jurisdictional statement filed.
June 1, 1982	Motion to dismiss filed.
June 1, 1982	DISTRIBUTED. 6-17.
June 4, 1982	Reply brief for the appellant filed. (D).
June 21, 1982	Probable jurisdiction NOTED.

July 26, 1982	Joint appendix filed.
July 26, 1982	Order extending time to file the appellant's brief on the merits until Aug. 23, 1982.
Aug. 23, 1982	Brief of appellant Minneapolis Star and Tribune Co. filed.
Aug. 23, 1982	Brief, amicus curiae, of Knight-Ridder Newspaper, Inc. and American Newspaper Publishers Assoc. filed.
Aug. 24, 1982	Brief, amicus curiae, of the American Civil Liberties Union The Minnesota Civil Liberties Union and The Minnesota Coalition Against Censorship filed
Sept. 16, 1982	Order extending time to file the appellee's brief on the merits until Sept. 30, 1982.
Sept. 29, 1982	Brief for the appellee filed.
Nov. 15, 1982	Reply brief for the appellant filed.
Nov. 17, 1982	CIRCULATED.
Jan. 12, 1983	ARGUED.